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MORE PROCESS THAN PEACE: LEGITIMACY, COMPLIANCE, AND THE OSLO ACCORDS

*Orde F. Kittrie**

THE ISRAELI-PALESTINIAN PEACE PROCESS: OSLO AND THE LESSONS OF FAILURE — PERSPECTIVES, PREDICAMENTS AND PROSPECTS. Edited by *Robert L. Rothstein, Moshe Ma'oz, and Khalil Shikaki*. Portland: Sussex Academic Press. 2002. Pp. xvii, 174. \$67.50.

BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD'S TOUGHEST POST-COLD WAR CONFLICTS. A PUBLICATION OF THE PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL. By *Michael Watkins and Susan Rosegrant*. San Francisco: Jossey-Bass. 2001. Pp. xxii, 346. \$40.

INTRODUCTION

A. *Overview*

The 21st century has inherited a number of bloody and long-unresolved intranational conflicts,¹ including those in Kashmir,

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1. PEACE AND CONFLICT 2003: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF-DETERMINATION MOVEMENTS, AND DEMOCRACY (2003) is a particularly useful survey of the world's armed conflicts, both those which are *intranational* or "societal," and those which are *international*. Published in January 2003 by the University of Maryland's Center for International Development and Conflict Management, *Peace and Conflict* states that there were twelve "ongoing major societal wars" at the end of 2002: Russia-Chechens, Colombia, Algeria, Israel-Palestinians, Nepal, India-Kashmiri Muslims, Philippines-Moro Muslims, Burundi-Hutus, Sudan-Southerners, Congo-Kinshasa, Ivory Coast, and Liberia. *Id.* at 12. It lists eleven additional "societal wars [which] were experiencing sporadic outbursts of violence at the end of 2002." *Id.* at 13. Interestingly, it also notes that "[t]he 1990 Iraq invasion of Kuwait and the subsequent 1991 U.S.-led Gulf War to expel the invaders is the only ambiguous interstate war during the post-Cold War era." *Id.* (The report was published before the beginning of the 2003 U.S.-led invasion of Iraq.)

Northern Ireland, Burundi, Cyprus, Colombia, the Congo, the Philippines, and the Holy Land.² Negotiated efforts to resolve these conflicts through legally binding peace settlements have been attempted from time to time, but without lasting success.

Numerous negotiators' memoirs, political science books, and historians' tomes have been devoted to the subject of peace negotiations. But relatively little has been written about peace negotiations from a legal perspective. In particular, the legal literature contains virtually no discussion of what in the contents of a bilateral peace agreement's text can maximize the likelihood that the parties will comply with the peace agreement's terms.

There is a recent body of international legal scholarship that seeks to identify those characteristics of a multilateral agreement that can enhance the likelihood that parties will comply with the agreement. The primary focus of such international legal "compliance scholarship" has been on nonbinding agreements in "global issue" areas such as environmental protection. This Review expands compliance scholarship from the multilateral into the bilateral realm, and from global issues into the regional-conflict arena.

The foremost bilateral peacemaking effort of the last decade has been the attempt to resolve the Israeli-Palestinian conflict through the Oslo Peace Accords.³ Drawing from three key recent books, this Review uses the Accords as a case study. From this case study, it derives broader lessons about what in the contents of a bilateral peace agreement's text can maximize, and what can diminish, the likelihood that the parties will comply with the peace agreement's terms.

2. It is worth noting that most if not all of these protracted intranational conflicts are, like the Israeli-Palestinian struggle, about "the redefinition of territory, state formation, or control of the state" and are marked by "long-standing animosities rooted in a perceived threat to identity or survival." JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* 8, 17 (1997). Lederach notes that in such conflicts, "contested issues of substance (such as territory or governance) are intimately rooted in the cultural and psychological elements driving and sustaining the conflict." *Id.* at 17. At the same time, "the futures of those who are fighting are ultimately and intimately linked and interdependent." *Id.* at 27. The similarities between these intranational conflicts mean that lessons derived from the Oslo process seem especially likely to apply to peacemaking with respect to the other intranational conflicts. This Review will, however, refer to "peacemaking" as opposed to "peacemaking with respect to intranational conflicts" because it is this author's belief that the lessons this Review discusses are likely also to be applicable to processes and mechanisms for resolving most armed conflicts between states.

3. The first agreement that the Government of Israel and the Palestine Liberation Organization ("PLO") signed was the Arafat-Rabin exchange of mutual-recognition letters on September 9, 1993. Four days later, on the White House lawn, they signed the Declaration of Principles on Interim Self-Government Arrangements ("DOP"), which had been negotiated and initialed in Oslo, Norway. The terms "Oslo Accords" or "Accords," as used in this Review, includes the Arafat-Rabin letters of September 9, 1993, the DOP, and all subsequent written agreements between the Government of Israel and the PLO. The key such agreements are listed in Part II of this Review.

Drawing examples from the Accords, this Review will first survey the broad range of valuable contributions that international law can make to successful peace negotiations, and in particular to the drafting of a compliance-friendly, lasting peace agreement. These contributions include 1) supplying norms that can bind the peace negotiations and the resulting agreement, 2) offering dispute-resolution mechanisms, 3) lending legitimacy to the process and to the text, and 4) providing building blocks for the construction of the peace process and the final agreement. This Review will discuss why and how the Oslo process and texts failed to take advantage of most of these potential contributions.

The Review will then focus on the deleterious role of the two methodological pillars on which the Oslo negotiators did attempt to rely: a) “open-ended gradualism” and b) “constructive ambiguity”. As this Review will discuss, the Accords were “open-ended” in that they left almost completely open the fundamental question of what the permanent status agreement between the Israelis and Palestinians would eventually entail. The Accords’ framers instead relied on the two parties gradually making concessions towards each other on the assumption that over time confidence and trust would grow, making difficult issues easier to resolve. The Accords’ texts also contained a considerable amount of “constructive ambiguity” — papering over disagreements by using ambiguous phrases capable of being interpreted by each of the parties in a manner protective of their own interests or positions.

The Review will discuss why the drafters of the Oslo Accords chose to rely so heavily on open-ended gradualism and ambiguity in their efforts to turn peace negotiations into a legally binding, final settlement. It will then analyze how and why this reliance proved to be disastrously counterproductive. The Review concludes with a discussion of lessons learned, including lessons specifically applicable to future Israeli-Palestinian negotiations, and lessons generally applicable to designing peace negotiations, and peace agreement texts to maximize compliance with their terms.

B. *Introduction to the Literature*

The columnist Charles Krauthammer has memorably summarized the lessons he and many others draw from the bloody state of the Oslo peace process:

The great divide in American foreign policy thinking is between those who believe in paper and those who believe in power. The paper school was in charge of the 1990s. . . . The bloodiest farce was the Oslo ‘peace’ Living by paper — contracts and laws and courts and binding agreements — is lovely. It’s what makes domestic society civilized and decent. The problem is that the international arena is not domestic soci-

ety. It is a jungle. . . . Laboring over every jot and tittle — the life work of our paper-pushing peace processors — is quite mad. The beginning of wisdom is giving up this supremely naïve belief in paper.⁴

Krauthammer's are not words that international lawyers — who make a living laboring over international agreements — like to hear. Are Krauthammer and those who share his skepticism of peace agreements right? By now, more than ten years after the signing of the first Oslo Accord, much has been written about the political dynamics that contributed to Oslo's failure. As Part III of this Review discusses, there is a strong argument that the Oslo Accords were ultimately doomed to failure by Yasser Arafat's fundamental unwillingness to end the conflict with Israel. But is the futility of peace agreements with Yasser Arafat the only lesson to be learned from the failure of the Oslo Accords? Does careful scrutiny reveal that there are also structural reasons why the Oslo Accords brought more process than peace? Were there flaws in the design of the agreements that also discouraged the parties from complying with them? What important lessons that are applicable to other conflicts *can* be learned from Oslo? How can we maximize the ability of international law and international agreements to be useful tools for making peace in the international jungle? How can we use them to build sustainable processes and mechanisms capable of helping transform conflict into peace and reconciliation?

The Israeli-Palestinian Peace Process: Oslo and the Lessons of Failure ("Lessons of Failure") and *Breakthrough International Negotiation* ("Breakthrough") provide a useful starting point for inquiring into these critical questions.

Lessons of Failure is thoughtfully edited by Robert L. Rothstein (an American who is the Harvey Picker Professor of International Relations at Colgate University), Moshe Ma'oz (an Israeli who is Professor of Middle Eastern Studies at the Hebrew University of Jerusalem), and Khalil Shikaki (a Palestinian who is an Associate Professor of Political Science at Bir Zeit University). It presents a broad range of political perspectives on the Oslo process, from left-wing Israelis to an Islamist Palestinian who describes how "the very existence of 'Israel' is considered illegal" from an "Islamic point of view."⁵ The book makes for interesting reading, partly because each one of the commentators has a different view of what the Accords required and what the best way is to move forward. As this Review discusses, commentators across the spectrum, including those presented in *Lessons of Failure*, do seem to agree on one very interesting thing: that at least part of the reason the Oslo process failed lies with the

4. Charles Krauthammer, *The Clinton Paper Chase*, WASH. POST, Oct. 25, 2002, at A29.

5. Mustafa Abu Sway, *Islamic Perspectives on the Oslo Process*, in LESSONS OF FAILURE, p. 86.

structure and text of the Accords themselves, and especially their reliance on open-ended gradualism and constructive ambiguity.

Breakthrough was written by two Harvard faculty members, Michael Watkins⁶ and Susan Rosegrant,⁷ under the auspices of the Program on Negotiation at Harvard Law School. It intersperses chapters on international negotiation theory with chapters applying those theories to four major recent, international negotiations, including the Oslo process. The Oslo-specific chapters, as well as the chapters of general international negotiation theory, facilitate an analysis of Oslo in light of the latest theoretical wisdom about international negotiations.

As resources for determining Oslo's lessons, the political science perspectives of *Lessons of Failure* and the negotiating theory perspectives of *Breakthrough* are nicely complemented by *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements*⁸ ("Oslo & International Law"), by Geoffrey R. Watson. Watson is a professor of law at Catholic University of America. Watson's is the rare book that approaches a peace negotiation from an international legal perspective. *Oslo & International Law* deftly parses the Accords' specific terms and assesses them in the context of broader international legal principles as well as other international agreements. *Oslo & International Law* is organized as answers to four major legal questions about the Oslo process: whether the Accords are legally binding; to what extent each side has complied with its obligations under the Accords; what effect violations have on each of the parties' outstanding obligations; and how international law can help shape a final settlement of the Israeli-Palestinian conflict.⁹ Together, *Lessons of Failure*, *Breakthrough*, and *Oslo & International Law* provide valuable insight into why the Palestinians and the Israelis failed to comply with the Oslo Accords, what negotiating and drafting improvements could have maximized compliance with the Accords, and what contributions paper documents and indeed international law can make to the resolution of conflicts in the international jungle.

Unfortunately, despite the excellent raw material they provide, none of these books has an organizational structure or analytical scheme that is particularly helpful for systematically assessing where the Oslo process failed in its use of international law to negotiate and create a sustainable peace. Each chapter of *Lessons of Failure* is written by a different analyst; almost without exception, the chapters con-

6. Associate Professor of Business Administration, Harvard Business School.

7. Faculty Member, John F. Kennedy School of Government, Harvard University.

8. GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* (2000).

9. *Id.* at vii.

sist of that analyst's enumeration of all the key factors which he or she believes contributed to Oslo's failure. *Breakthrough* provides an outstanding overview of relevant negotiations theory, and very useful insight into how the Israelis and Palestinians were coaxed into reaching their first agreement in Oslo. But it contains almost no analysis of how the methods used to coax them at the beginning — including ambiguity, gradualism, and open-endedness — may have contributed to the eventual failure of the process begun at Oslo. The questions that *Oslo & International Law* addresses are important, and it is a generally superb book. But, as this Review will discuss, the book provides an inadequate, and indeed in many ways incorrect, assessment of what changes to the Oslo Accords could have maximized, and what in the Accords tended to diminish, the likelihood that the parties would comply with the Accords' terms.

Rather than summarizing and analyzing each of these books in turn, this Review instead draws from them to assess systematically the Oslo process's use of international law to negotiate and create a sustainable peace. In examining the interplay between peacemaking, negotiations theory and practice, and international law, this Review ventures into relatively uncharted territory. As Kenneth W. Stein and Samuel W. Lewis pointed out in their pre-*Oslo* book, *Making Peace Among Arabs and Israelis: Lessons from Fifty Years of Negotiating Experience* ("Making Peace"), "lessons from the history of U.S.-Arab-Israeli negotiations have rarely if ever been extracted and systematically applied."¹⁰ This gap in the literature is not limited to peace negotiations between Arabs and Israelis. Remarkably little has been written about how bilateral international agreements in general can be designed so as to maximize the likelihood that parties will comply with them.¹¹ This is especially true of peace agreements, which some might consider as the most important and challenging form of bilateral international agreements. Indeed, Richard B. Bilder's 1981 book, *Managing the Risks of International Agreement*, stands practically alone in serving as a practical guide to maximizing compliance with bilateral international agreements of any type.

The lack of scholarship on using international law to negotiate and create sustainable peace processes and agreements is particularly notable with respect to the Israeli-Palestinian conflict. While that conflict "has been waged primarily on political and military battle-grounds . . . a legal war has also raged on paper, and it has been as hard-fought as any of the Arab-Israeli wars."¹² Even though the

10. KENNETH W. STEIN & SAMUEL W. LEWIS, *MAKING PEACE AMONG ARABS AND ISRAELIS: LESSONS FROM FIFTY YEARS OF NEGOTIATING EXPERIENCE* ix (1991).

11. Interview with Robert Dalton, Assistant Legal Adviser for Treaty Affairs, United States Department of State, in Washington, D.C. (Jan. 23, 2003).

12. WATSON, *supra* note 8, at 1.

Israeli-Palestinian conflict has manifested itself most saliently as a bloody struggle waged using bombs and bullets, both sides have, throughout the conflict, looked to international law to provide both justifications for their actions, and potential means of resolving their conflict.

I. THE OSLO ACCORDS

A. *Introduction to the Accords*

The Arafat-Rabin exchange of mutual-recognition letters, signed on September 9, 1993, was the first of the Oslo Accords. In his letter, Yasser Arafat, in his capacity as Chairman of the Palestine Liberation Organization, confirmed that the PLO: "recognizes the right of the State of Israel to exist in peace and security;" "commits itself to . . . a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations;" and "renounces the use of terrorism and other acts of violence."¹³ Yitzhak Rabin, in his capacity as Prime Minister of Israel, replied to Arafat's letter with a letter in which Rabin confirmed that "in light of the PLO commitments included in your letter, the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process."¹⁴

Four days later, on September 13, 1993, the DOP was signed on the White House lawn. In the preamble, the Government of Israel and the PLO declared it their goal to "put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process."¹⁵

The DOP was succeeded by the following major agreements between Israel and the PLO: the Agreement on the Gaza Strip and the Jericho Area, signed on May 4, 1994;¹⁶ the Agreement on Preparatory Transfer of Powers and Responsibilities, signed on August 29, 1994;¹⁷ the Israeli-Palestinian Interim Agreement on the West Bank and the

13. Letter from Arafat to Rabin (Sept. 9, 1993), *reprinted in* WATSON, *supra* note 8, at 315.

14. *Id.* at 316.

15. DOP Preamble (Sept. 13, 1993), *reprinted in* WATSON, *supra* note 8, at 317-27.

16. Agreement on the Gaza Strip and the Jericho Area (May 4, 1994), *reprinted in* WATSON, *supra* note 8, at 328-39.

17. Agreement on Preparatory Transfer of Powers and Responsibilities (Aug. 29, 1994), *reprinted in* WATSON, *supra* note 8, at 340-48.

Gaza Strip, signed on September 28, 1995;¹⁸ the Protocol Concerning the Redeployment in Hebron, signed January 15, 1997;¹⁹ the Wye River Memorandum, signed on October 23, 1998;²⁰ and the Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, signed on September 4, 1999.²¹ Some of these agreements included attachments, such as annexes, maps, agreed minutes, notes for the record, and the like. In total, the Oslo Accords add up to some one thousand pieces of paper.²²

The Oslo Accords provided for a five year transition period to begin with Israeli withdrawal from the Gaza Strip and Jericho area, and to end with a "permanent settlement." Permanent-status negotiations were to "commence as soon as possible, but not later than the beginning of the third year of the interim period."²³ The transitional period began on May 4, 1994 and was to conclude on May 4, 1999. Although permanent-status negotiations did take place, including those at Camp David in July 2000, no permanent settlement was reached.

The Oslo Accords were largely, if not entirely, a failure. The basic criterion for evaluating the value of any diplomatic instrument is the degree to which it helped to achieve its declared objective. In this instance, the declared objective was a "just, lasting and comprehensive peace settlement and historic reconciliation."²⁴ By mid-2003, the decade since the September 1993 signing on the White House lawn had seen the renewal of the Palestinian terrorist campaign against Israel, hundreds of dead on both sides, the reoccupation of most of the West Bank, enormous damage to both the Israeli and Palestinian economies, and the missing of practically every Oslo deadline. Dennis Ross, the Special Middle East Coordinator who was the lead American negotiator with respect to the Arab-Israeli conflict during the Clinton Administration, wrote as follows at the end of 2002:

In my 20 years involved in Middle East diplomacy, there have been many times when the effort toward peace appeared futile to the parties

18. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Sept. 28, 1995), *reprinted in* WATSON, *supra* note 8, at 349-68.

19. Protocol Concerning the Redeployment in Hebron (Jan. 15, 1997), *reprinted in* WATSON, *supra* note 8, at 369-74.

20. Wye River Memorandum (Oct. 23, 1998), *reprinted in* WATSON, *supra* note 8, at 377-84.

21. Sharm el-Sheikh Memorandum (Sept. 4, 1999), *reprinted in* WATSON, *supra* note 8, at 385-89.

22. *See, e.g.,* AHARON KLEIMAN, CONSTRUCTIVE AMBIGUITY IN MIDDLE EAST PEACE-MAKING 57 (1999).

23. DOP Article V, *reprinted in* WATSON, *supra* note 8, at 318.

24. DOP Preamble, *reprinted in* WATSON, *supra* note 8, at 317.

involved. But none of those times had the ring of hopelessness that I see in the region today. It is clear that Israelis, after two years of violence, believe they have no partner for peace among the Palestinians. For their part, Palestinians question whether the current Israeli government has any plan other than to try to extinguish their aspirations through force.²⁵

In mid 2003, there was some hope that in the wake of Gulf War II, the Road Map process might succeed in picking up the pieces of Oslo and moving the parties toward peace. Such an effort to pick up Oslo's pieces makes it even more important to try to understand why Oslo fell apart in the first place.

Many people believe that Oslo was doomed to failure because the Palestinian leader, Yasser Arafat, was unwilling to make peace with Israel on any terms. This Review will briefly examine that possibility and its implications. But the Review will argue that, whether or not this was the case, major methodological flaws in the structure and text of the Oslo Accords also stood in the way of peace. In the course of this analysis, this Review will not focus on the substance of the Accords, or of the Israeli-Palestinian conflict as a whole. It will focus instead on the legal processes and methodologies used to build the Accords, and on what the failure of these methodologies meant for the outcome of the Accords.

B. *Introduction to the Methodology of the Accords*

Negotiation theory focuses on the critical role of process and methodology in determining the success of conflict resolution efforts (p. xiv). Drawing heavily on the classics in the field of conflict resolution, *Breakthrough* notes that, "Skilled negotiators think hard about the impact of process on perceptions of interests and alternatives, on the part of their counterparts and those they represent, and on their own side. Then they work to fashion — often to negotiate — processes likely to lead in favorable directions" (p. xviii).

Part of what makes the Oslo Accords especially interesting from a methodological perspective is that they took an unusual — some have said "uniquely structured"²⁶ — approach to trying to achieve their desired outcome. Joel Singer, the attorney who joined the Israeli team in Oslo and continued to serve as Israel's lawyer for the first several years of the Oslo process (including as the Legal Adviser to Israel's Foreign Ministry), has characterized this unusual approach as follows:

Usually . . . you agree on a general framework that includes the basic agreement of the parties on the fundamental elements of their dispute, leaving for later agreements all the details of the implementation of the

25. Dennis Ross, *Mapping Out Peace in the Mideast*, L.A. TIMES, Dec. 20, 2002, at B15.

26. Joel Singer, Capitol Hill Briefing (Sept. 14, 1997), LEXIS, Nexis Library, Federal News Service File.

basic framework agreement. The Oslo Agreement was uniquely structured in a reverse manner. It is full of details regarding the day to day administration of a five year transitional period, leaving open for a later agreement the most important question of the ultimate settlement of the Israeli-Palestinian dispute.²⁷

Aaron Miller, the Deputy Special Middle East Coordinator during the Clinton Administration, has described the reason for this “reverse” of the normal methodological approach as follows: “The logic of Oslo was to defer for now issues that could not be resolved on the assumption that over time confidence and trust . . . would grow so that even while [an issue such as] Jerusalem could not be resolved in 1993, a solution could be worked out later.”²⁸

“Traditional bargain theory” requires “a contract that provides for all contingencies and comprehensively specifies [all the details] of performance.”²⁹ By contrast, the Israelis and Palestinians developed at Oslo a declaration of principles that purposefully “guaranteed nothing about whether or how the central substantive issues would be resolved.”³⁰ Instead, the DOP and its follow-on agreements created a legally structured process designed to build trust. Central, substantive issues were to be tackled once trust had thus been built.

Four specific methodologies characterized Oslo’s trust-building process: 1) open-ended gradualism, 2) constructive ambiguity, 3) bilateralism, and 4) reciprocity.³¹ As Terje Roed-Larsen, the Norwegian impresario of the Oslo talks, pointed out in an article on the ninth anniversary of the secret initialing of the DOP in Oslo, “the Oslo process used a few key tactics. One was gradualism — solving what was solvable, moving gradually forward and building trust along the way. Another was bilateralism — Israelis and Palestinians negotiated directly, with third party roles often confined to facilitation.”³² “Bilateralism” can be defined as a focus on direct negotiations between the parties, with minimum reliance on third-party mediation. “Constructive ambiguity” means the deliberate use of vague, equivocal, or ambiguous language capable of being interpreted by each party as protecting its own interests. “Reciprocity” is an emphasis on each

27. *Id.*

28. Aaron Miller, *The Pursuit of Israeli-Palestinian Peace: A Retrospective*, in LESSONS OF FAILURE, p. 34.

29. Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621, 623 (1993).

30. Robert L. Rothstein, *A Fragile Peace: Are There Only Lessons of Failure?*, in LESSONS OF FAILURE, p. 163 [hereinafter Rothstein, *Are There Only Lessons*].

31. This Reviewer’s definitions of “open-ended gradualism” and “constructive ambiguity” in the Oslo context are set forth in detail in the following Parts and Sections of this Review: Overview; IV. Open-Ended Gradualism; and V. Constructive Ambiguity.

32. Terje Roed-Larsen, *This Time the World Has to Act*, INT’L HERALD TRIB., Aug. 20, 2002, at 6.

party's performance being conditioned on the other party's performance.³³ Larsen has characterized such confidence-building approaches as a special "kind of diplomacy . . . the spirit of Oslo," a diplomacy emphasizing "the necessity of building . . . confidence" and overcoming "lack of trust."³⁴

Professor Watson, in the conclusion of *Oslo & International Law*, refers to the positive value of these four methodologies as part of the "broader lessons" that the Oslo Accords "teach . . . about the peaceful settlement of disputes."³⁵ Watson posits "the value of vagueness and ambiguity,"³⁶ "the value of gradualism,"³⁷ "the importance of reciprocity,"³⁸ and the "lesson . . . that not every regional conflict requires mediation."³⁹ Drawing in large part on *Lessons of Failure, Breakthrough*, and *Oslo & International Law*, but at times also on other sources, this Review focuses mainly on two of these particular methodologies of the Oslo process — open-ended gradualism and ambiguity. It argues that among the most salient lessons of Oslo is the counterproductiveness of relying on open-ended gradualism and ambiguity as key elements of a peace process and agreement.

International law can make several valuable types of contributions to a peace process. As this Review will discuss, the Accords' framers did not avail themselves of most of these potential positive contributions. That failure meant the Accords were, from the beginning, weaker than they could have been. The damage done by the Oslo Accords' misreliance on open-ended gradualism and ambiguity was particularly significant in part because of that congenital weakness.

The next Part of this Review surveys the broad range of valuable contributions that international law can make to peacemaking and discusses why and how the Oslo Accords failed to take advantage of most of them. Subsequent Parts focus on the reasons the negotiations relied heavily on open-ended gradualism and ambiguity, and the disastrous results of that reliance.

II. PEACEMAKING AND INTERNATIONAL LAW

"[I]nternational law can help bring about the dream of peace,"⁴⁰ writes Catholic University's Professor Watson in the preface to *Oslo*

33. See WATSON, *supra* note 8, at 308-10.

34. *Oslo Plus Five — The Spirit of Oslo: Interview with Ambassador Terje Roed Larsen*, MIDDLE EAST INSIGHT, Nov. 1991, at 1, 2.

35. WATSON, *supra* note 8, at 309.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 310.

40. *Id.* at x.

& *International Law*. International law's potential contributions to negotiating peace can be categorized as follows: 1) supplying norms that can bound the peace process (including interim agreements) and the resulting permanent status agreement; 2) offering mechanisms for resolving disputes between the parties; 3) increasing the likelihood of day to day compliance with interim or permanent agreements by lending legitimacy to the process and the texts; and 4) providing building blocks for constructing the peace process and the final agreement.

A. *Bounding Norms*

Oslo & International Law is largely about the interaction between the Oslo process and Accords and the international legal norms that might be relevant to bounding that process and a permanent status agreement. Watson reviews not only specific legal requirements, such as the potential applicability to Israeli settlement-building of particular provisions of the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War,⁴¹ but also general procedural norms of international law, such as the duty to interpret and perform obligations in good faith, which he calls "[a] fundamental principle of treaty law" that is "declarat[ive] of customary international law."⁴² *Oslo & International Law* is so thorough and thoughtful that it provides an essential guide not just to the Oslo Accords and their implementation but indeed to all the key international legal norm issues that have arisen with respect to the Israeli-Palestinian conflict. But Watson does not disguise his skepticism about the practical value of international legal norms, whatever their level of specificity, to Israeli-Palestinian peacemaking. For example, in discussing Palestinian claims to a right of self-determination, he concludes that "the content of the right of self-determination is indeterminate," that "variegated practice might lead one to conclude that there is no meaningful right of self-determination at all," and that self-determination is clearly "not a fixed norm that points to only one solution."⁴³

With respect to the pivotal question of Jerusalem, Professor Watson notes that "[t]here are few questions in international law that evoke a stronger emotional response than" the question of "[w]hat is the status of Jerusalem, and who is entitled to territorial sovereignty there?"⁴⁴ Then he says that "[i]f the negotiators wish to make any

41. *Id.* at 136-42.

42. *Id.* at 124.

43. *Id.* at 270-72.

44. *Id.* at 267.

progress, they will not answer it.”⁴⁵ Because “[n]o arbitral tribunal will ever resolve this dispute,” says Watson, “in one sense an assessment of the competing claims is pointless: plainly the only way out of the log-jam is some negotiated compromise.”⁴⁶ The negotiators’ goal, says Watson, “should be to supplant the existing arguments about Jerusalem with a new legal regime that is binding on, and generally acceptable to, all parties.”⁴⁷ “[T]he important task,” he says, “is to create new law.”⁴⁸ In other words, to use legal building blocks to construct processes and agreements solidifying the results of the parties’ negotiations.

B. *Dispute Resolution Mechanisms*

International law offers numerous, formal mechanisms for resolving disputes between the parties to an agreement. In the Accords, the Palestinian Authority (“PA”)/PLO and Israel specifically listed several such formal international dispute resolution mechanisms, including conciliation and arbitration, as options to which they could turn for resolving disputes.⁴⁹ But they never chose to avail themselves of these mechanisms. Other provisions of the Accords *required* the parties to avail themselves of specific dispute resolution mechanisms in certain circumstances. For example, Article XV of the DOP mandates that “[d]isputes arising out of the application or interpretation of the DOP, or any subsequent agreements pertaining to the interim period, *shall* be resolved by negotiations through the Joint Liaison Committee.”⁵⁰ But the parties also failed to make use of these required dispute resolution mechanisms. Instead, in dispute after dispute, both the PA/PLO and Israel “ignored the dispute-resolution provisions of the Oslo Accords and of general treaty law.”⁵¹

Watson suggests that Israel and the Palestinians may have been wary of formal dispute resolution mechanisms in part because neither party was prepared to call into question the continued vitality of the Accords by formally accusing the other of a “material breach,” and international law is very unclear as to what principles apply in the circumstance of a “minor breach.”⁵² For whatever the reason, including perhaps this gap in international law, the dispute resolution

45. *Id.*

46. *Id.* at 268.

47. *Id.* at 267.

48. *Id.*

49. *See, e.g.,* DOP Article XV, *reprinted in* WATSON, *supra* note 8, at 321.

50. WATSON, *supra* note 8, at 321 (emphasis added).

51. *Id.* at 217; *see also id.* at 120-21, 210.

52. *Id.* at 309-10.

mechanisms made available by international law played virtually no role in the Oslo process.

C. *Legitimacy and Compliance*

Legitimacy, the factor which noncoercively encourages compliance with laws both domestic and international, was compellingly described by the United States Supreme Court in *Planned Parenthood v. Casey*.⁵³ The *Casey* Court observed that “[t]he Court’s power lies . . . in its *legitimacy*, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”⁵⁴ Legitimacy is “the source of this Court’s authority” because “except to a minor degree, [the Court] cannot independently coerce obedience to its decrees.”⁵⁵ Having thus summarized legitimacy’s meaning and significance, the Court went on to discuss “the conditions necessary for its preservation.”⁵⁶ For the Court, its legitimacy — the factor which noncoercively encourages compliance with its rulings — is not a static reflection of the Court’s place in the Constitution, but rather something which must be tended to, preserved, and, if possible, enhanced. The Court places great importance on nurturing its legitimacy even though compliance with the Court’s decisions is now solidly grounded in over two hundred years of American history, tradition, theory, and practice.

Legitimacy maximization is comparatively even more valuable for encouraging compliance with agreements in the “international jungle.” Professor Thomas Franck’s seminal *The Power of Legitimacy Among Nations* is undoubtedly the foremost book on legitimacy and international law. In it, Franck observes that many “international rules of conduct are habitually obeyed by states,”⁵⁷ even in the absence of a global sovereign “with a supranational police force.”⁵⁸ Franck’s book endeavors to answer the question of *why* “international rules” (his term for international laws) “are mostly obeyed” even though they “usually are not enforced.”⁵⁹ Franck posits that the answer lies in legitimacy, “the non-coercive factor, or bundle of factors, predisposing toward voluntary obedience.”⁶⁰ Franck speculates that those “texts

53. 505 U.S. 833 (1992).

54. *Casey*, 505 U.S. at 865 (emphasis added).

55. *Id.*

56. *Id.*

57. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 20 (1990).

58. *Id.* at 22.

59. *Id.* at 3.

60. *Id.* at 16.

which are rarely obeyed are obeyed rarely because — or in part because — they, or the institutions which generated them, do not appear legitimate . . . some, or most, of the time.”⁶¹

Franck’s investigation of which attributes lend legitimacy to international rules is extremely helpful for understanding why the Oslo Accords were *not* more often “obeyed.” There is, at least thus far, no world policeman to force the PA/PLO and Israel to abide by the terms to which they agreed in the Oslo Accords, and the parties have proven themselves unable to forcibly coerce each other into abiding by those terms. In the absence of such coercive enforcement, the parties’ willingness to obey the Oslo Accords — and each of the Accords’ discrete provisions — would, per Franck’s analysis, depend on the parties’ initial and continuing perception of the Accords’, and discrete provisions’, legitimacy.

Two threshold questions regarding the Oslo Accords, and any legitimacy that their legal status can, or could, have lent them are, of course, whether the Accords were legally binding when signed and whether they continue to be in force. Professor Watson in *Oslo & International Law* finds that the Oslo Accords “do not fit the traditional definition of a treaty, which is *an agreement between nation-states*,”⁶² because neither the PLO nor the PA has ever met the traditional international legal test of statehood.⁶³ Watson notes that the “counterintuitive conclusion” that “the Oslo Accords are probably not treaties under traditional treaty law, as embodied in the Vienna Convention on the Law of Treaties . . . says something about the narrow scope of the Vienna Convention and, more generally, about the formalism that pervades international law.”⁶⁴

Watson concludes, however, that the Accords are nonetheless “legally binding *as agreements between subjects of international law*.”⁶⁵ In reaching this conclusion, Watson relies in part on Article 3 of the Vienna Convention, which provides: “The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law . . . shall not affect . . . [t]he legal force of such agreements”⁶⁶ In other words, says Watson, “the modern customary law of international agreements is broader than the Vienna Convention,”⁶⁷ and “agreements involving

61. *Id.*

62. WATSON, *supra* note 8, at vii (emphasis added).

63. *See id.* at 60, 63, 71.

64. *Id.* at 74.

65. *Id.* at vii (emphasis added).

66. Vienna Convention on the Law of Treaties, May 23, 1969, art. III, 1155 U.N.T.S. 331, 333-34.

67. WATSON, *supra* note 8, at 74.

'other subjects of international law' may be binding under the customary law of treaties, even if they are not binding under the Vienna Convention itself."⁶⁸ He then points to the phrasing of the Accords,⁶⁹ subsequent practice of the parties,⁷⁰ and various precedents for binding agreements between states and sub-state entities⁷¹ to solidify his conclusion that the Oslo Accords are examples of such binding agreements between states and other "subject[s] of international law."⁷²

Watson's detailed defense of his conclusion that the Accords are binding is necessary because the question of the Accords' binding effect, like so much in the Accords themselves, is somewhat ambiguous. Watson devotes several pages to rival theories that have been propounded on this issue, including that the Accords are "quasi-binding 'soft law'"⁷³ and that "the Oslo Accords are utterly non-binding instruments that have no legal consequence whatsoever."⁷⁴ According to Watson, "[e]ven the United States, one of the principal facilitators of the peace process, has stepped lightly around the question of the legal status of the Oslo Accords."⁷⁵

For Watson, the importance of the Oslo Accords being considered legally binding lies at least in part in the added legitimacy that seems to be ascribed to legally binding documents. Parties, he says, "tend to regard legal obligations more seriously than non-legal ones."⁷⁶ If Israel and the Palestinians have in the Oslo Accords "signed binding commitments, then the international community as well as the parties themselves may expect a higher degree of fidelity to the agreements than if they are non-binding policy papers."⁷⁷

68. *Id.* at 58.

69. *See id.* at 56, 101.

70. *See id.* at 76.

71. *See, e.g., id.* at 92-99.

72. *See, e.g., id.* at 91-92.

73. *See id.* at 82.

74. *Id.* at 83.

75. *Id.* at 80. It is worth noting, however, that the normally encyclopedic Watson provides relatively little support for this assessment of the U.S. position, citing only a single draft letter from then Secretary of State Christopher to the Prime Minister of Israel at the time, Benjamin Netanyahu. *Id.*

76. *Id.* at vii. As Professor Louis Henkin notes, "Nations observe law, in part, for what may be called 'psychological' reasons. There is an influence for law observance in the very quality of law, in the sense of obligation which it implies." LOUIS HENKIN, *HOW NATIONS BEHAVE* 56 (1968). "That a nation consented to an obligation," says Henkin, "inevitably generates some influence for its observance." *Id.* "Psychological" reasons for compliance may, as Lederach posits, be particularly important in intranational conflicts, in which the enemy is closer at hand and the animosities are often more intensely felt and of longer standing. LEDERACH, *supra* note 2, at 17.

77. WATSON, *supra* note 8, at 55.

The perceived legitimacy of a process and agreement is, of course, affected not only by whether the agreement itself is legally binding, but also by various elements of the process and text.⁷⁸ The Oslo Accords failed to bring peace partly because key elements of their design caused the Accords to lose rather than gain legitimacy as time passed.

In *The Power of Legitimacy Among Nations*, Franck examines "the structure of rule texts themselves for evidence of *literary* properties which appear to exert a pull in the direction of voluntary compliance."⁷⁹ He concludes that "[t]he pre-eminent literary property affecting legitimacy is the rule text's *determinacy*: that which makes its message clear."⁸⁰ He notes that "[t]he same quality may also be termed its 'transparency.'"⁸¹ Franck gives several reasons why determinacy is so critical to legitimacy. He begins with the basic fact that "states or persons to whose conduct the rule is directed will know more precisely what is expected of them, which is a necessary first step towards compliance."⁸² He also notes that "indeterminacy . . . makes it easier to justify non-compliance"⁸³ by rendering the provision in question so "malleable" that it is open to being twisted to mean something far from what it was originally intended to mean.⁸⁴

Franck's seminal work on legitimacy is one of several key works containing useful insights into how to foster compliance⁸⁵ with international legal instruments. Franck's book was preceded by Louis

78. That is why some provisions of binding agreements are complied with more regularity than others. In legal scholarship, this is reflected in the several books which have been written on compliance with nonbinding accords. See, e.g., COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000); INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss ed., 1997).

79. FRANCK, *supra* note 59, at 52.

80. *Id.*; see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 10 (1995) (stating "ambiguity and indeterminacy of treaty language" is one of the key reasons lying "at the root of" treaty-violating behavior).

81. FRANCK, *supra* note 59, at 52.

82. *Id.*

83. *Id.* at 54.

84. *Id.* at 54; see *id.* at 54-57.

85. "Compliance" analysis looks to whether and why states actually abide by their procedural and substantive international obligations. Peter M. Haas writes that "[c]ompliance refers to whether countries in fact adhere to the provision of the accord and to the implementing measures that they have instituted." Peter M. Haas, *Why Comply, or Some Hypotheses in Search of An Analyst*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 21, *supra* note 78 [hereinafter Haas, *Why Comply*]. "[C]ompliance scholars," explains Professor Alvarez, "are hoping to identify which characteristics of the actors involved in an activity, the international environment, or the instrument involved (such as a treaty) have an impact on the likelihood that any international norm will be given effect." Jose E. Alvarez, *Foreword: Why Nations Behave*, 19 MICH. J. INT'L L. 303, 305 (1998).

Henkin's important *How Nations Behave* and has been followed by other important works on the subject.⁸⁶ Interestingly, all or almost all of these works explicitly focus on compliance with multilateral, rather than bilateral, regimes. This is a major gap in the literature.

A review of the existing literature reveals that many of the factors that scholars have identified as creating a pull towards compliance with multilateral regimes were entirely absent from the Oslo Accords, or nearly so. Several of these compliance-pull factors seem generally less likely to be as present in bilateral regimes as in multilateral,⁸⁷ a proposition surely worth future investigation. There is, however, little doubt about the absence of many of them from the Oslo Accords. Some of these compliance-pull factors were inevitably less present in the Oslo Accords than they might be in other bilateral, or certainly multilateral, agreements, because of the parties' histories, their respective places in the international community, and the particular nature of their conflict. Other compliance-pull factors were less present in the Oslo Accords because of the specific design of the Accords, and particularly their misplaced reliance on open-ended gradualism and ambiguity.

One compliance-pull factor that Franck discusses is the phenomenon of parties choosing to obey a rule, despite the fact that violating it would bring certain short-term gains, because they expect that their "long-term benefits from the future operation of the same norm" will outweigh the short-term gains.⁸⁸ Thus, for example, a country might respect an errant diplomat's immunity today in part because it wants its own diplomats to be protected by that very same norm tomorrow. This potentially beneficial phenomenon is less applicable to the Oslo Accords because under Oslo — unlike with most international agreements — the obligations which the two parties undertook are in most cases very different. The key Israeli commitments involve redeployment while the key Palestinian commitments involve cracking down

86. The field is nonetheless apparently still in its infancy. As Peter M. Haas put it, "Questions of compliance — to what extent states comply, which states are likely to comply, what patterns of compliance exist within and across areas of regulation — have not been extensively investigated and remain poorly understood." Peter M. Haas, *Choosing to Comply: Theorizing from International Relations and Comparative Politics*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 64, *supra* note 78 [hereinafter Haas, *Choosing to Comply*].

87. As the following discussion implies, there are a number of reasons why this is the case, including that agreements adhered to by multiple parties may more readily be perceived as legitimate, that such agreements can bring to bear compliance pressure from a larger number of parties with "full standing" to apply such pressure, and that multilateral agreements often have managing entities, which, like domestic judges, can provide legitimate interpretations of norms and create "an interactive, dialectic process of justificatory discourse, in which norms are invoked, interpreted, and elaborated in a way that generates pressure for compliance." Harold Hongju Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2638 (1997).

88. FRANCK, *supra* note 59, at 57.

on terrorism. Thus, for example, because the Palestinians know there is no terrorism crackdown provision that they will need to hold the Israelis to, they have no incentive to broadly interpret and vigorously adhere to the crackdown provisions today so that they can insist tomorrow that the Israelis operate on the basis of the same broad, vigorous interpretation of that same norm.⁸⁹

Franck also posits that “[a] rule with low textual determinacy,” i.e. a rule that is ambiguous, may gain legitimacy “if it is open to a process of clarification by an authority recognized as legitimate by those to whom the rule is addressed.”⁹⁰ For example, the U.S. Supreme Court is accepted as the definitive interpreter of the people’s rights under the U.S. Constitution. In contrast, as has been discussed above, the parties to the Accords failed to institute a definitive mechanism or mechanisms for resolving disputes as to what the Accords’ texts required of them. The lack of such an authoritative mechanism meant that the Accords could not benefit from clarification by a legitimate authority as a means for enhancing the texts’ determinacy and legitimacy.

The Oslo Accords also did not specify the costs or consequences of violations. In *How Nations Behave*, Louis Henkin mentions that some international agreements contain provisions that “make explicit the cost or consequences of a violation.” He notes that “[w]hile usually the principal purpose of such provisions is to render response more nearly certain and violation therefore prohibitive, definition in advance may also serve to limit the response and thus avoid excessive reaction, counter-retaliation, and the breakdown of the treaty system.”⁹¹ Thus the lack of Oslo Accords provisions specifying the cost or consequences of violations may have contributed both to the Accords’ failure to deter violations, and to the spiral of increasingly violent reactions and counter-reactions that violations triggered.

The Oslo Accords also failed to foster the creation of vested material interests in compliance. Many international agreements create their “own bureaucracy with vested interests in compliance.”⁹² The Oslo Accords did not. Nor did they give “powerful domestic groups” strong material interests “in maintaining these agreements.”⁹³ Business interests tend to value economically oriented provisions, and provi-

89. Louis Henkin in *HOW NATIONS BEHAVE* 51 (1968) gives a reciprocal reason for why “laws or obligations that operate symmetrically between nations . . . are rarely violated.” “[T]hat a nation has itself invoked a rule,” says Henkin, “builds commitment to that rule when it is, in turn, invoked by others.” *Id.* at 56.

90. FRANCK, *supra* note 59, at 61.

91. HENKIN, *supra* note 89, at 52.

92. *Id.* at 57.

93. *Id.* at 58. Peter M. Haas, in *Why Comply*, refers to the phenomenon as “the mobilization of domestic interests that anticipate material gain from compliance.” Haas, *Why Comply*, *supra* note 85, at 27-28.

sions that create stability and predictability. But there was not a significant economic component to the Accords. Moreover, their open-endedness and gradualism, which will be discussed in Part IV of this Review, did not contribute to but rather undercut any ability to predict what the situation would look like either after each stage of the interim period or after a permanent-status agreement.

In his influential essay entitled *Why Do Nations Obey International Law?*, Harold Koh divides the contemporary literature regarding compliance with international law into four conceptual strands. One he calls a "rationalistic instrumentalist strand that views international rules as instruments whereby states seek to attain their interests in wealth, power, and the like."⁹⁴ Koh notes that

international relations scholars such as Robert Keohane, Duncan Snidal, and Oran Young, and legal scholars such as Kenneth Abbott and John Setear, have applied increasingly sophisticated techniques of rational choice theory to argue that nation-states obey international law when it serves their short or long term self-interest to do so.⁹⁵

"Under this rationalistic account, pitched at the level of the international system," says Koh, "nations employ cooperative strategies to pursue a complex, multifaceted long-run national interest, in which compliance with negotiated legal norms serves as a winning long-term strategy."⁹⁶ Under the logic of this approach, the compliance-pull of the Oslo process was relatively weak for at least two reasons. First, the lack of clarity as to the nature of the permanent status towards which the process was leading weakened the Accords' compliance-pull as a specific "instrument" for attaining "wealth" and "power." Second, the relative isolation of the Israelis and the Palestinians from the international community, each for different reasons,⁹⁷ left them less concerned about further exclusion for failure to "employ cooperative strategies." It also may have made the two parties skeptical that their contributing to the strength of the international system by complying with its norms would result in their either 1) being substantively rewarded by the international community or 2) otherwise benefiting from the system's increased vitality. Having relatively less faith and investment in the international system, the parties were less subject to

94. Koh, *supra* note 87, at 2632.

95. *Id.*

96. *Id.*

97. For example, Israel remains the only United Nations member not fully part of a regional grouping and has thus never served on the Security Council and has almost never been selected to serve on other commissions and the like. Israel also views the United Nations system with great suspicion because of the numerous one-sided votes critical of Israel that have been cast in various U.N. fora. As for the Palestinians, they, lacking a state, have not been admitted to membership in the United Nations and their people and leadership have often been treated as pariahs by much of the international community.

a pull toward compliance based on a long-run interest in the international system's success.

Koh identifies "a second explanatory pathway" in modern compliance theory as following "a Kantian, liberal vein."⁹⁸ "The Kantian thread," says Koh, "divides into two identifiable strands."⁹⁹ One is based on Franck's previously discussed "notion of rule-legitimacy, and another . . . makes more expansive claims for the causal role of national identity."¹⁰⁰ In the second camp, says Koh, are " '[l]iberal international relations' theorists, such as Andrew Moravcsik and Anne-Marie Slaughter, [who] have argued that the determinative factor for whether nations obey can be found, not at a systemic level, but at the level of domestic structure."¹⁰¹ Koh explains that:

Under this view, compliance depends significantly on whether or not the state can be characterized as "liberal" in identity, that is, having a form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law. Flipping the now-familiar Kantian maxim that "democracies don't fight one another," these theorists posit that liberal democracies are more likely to 'do law' with one another . . .¹⁰²

As a set of agreements between a relatively liberal democracy and an authoritarian regime, the Oslo Accords did not benefit from this principle.

The final strand of contemporary compliance theory which Koh identifies is "a 'constructivist' strand."¹⁰³ Koh explains that "[u]nlike interest theorists, who tend to treat state interests as given, 'constructivists' have long argued that states and their interests are socially constructed by 'commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse.'"¹⁰⁴ Under this view, says Koh, nations "obey international rules not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value rule compliance."¹⁰⁵ This type of pull towards compliance also had relatively little impact on the Oslo process because 1) the parties, as relative outsiders to the international legal community (this was especially true of the Palestinians) had not developed a habit of obedience to international law, and 2) the gradu-

98. Koh, *supra* note 87, at 2633.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 2634.

alism of the Oslo process meant that many of its norms were regularly changing and thus also not subject to the development of habitual obedience.

Thus we see that the Oslo Accords' perceived legitimacy and pull towards compliance were weak from the very beginning. The protagonists' history, nature, and place in the international community had left the Accords with relatively little compliance-pull potential to draw from. Mistakes in working with what compliance-pull potential was left were particularly liable to be fatal.

D. *Building Blocks*

The next category of contribution which international law can make to peacemaking is "building blocks." Building blocks are the "nuts and bolts" out of which peace agreements, as well as interim processes such as Oslo's, are built. Some of the building blocks which international law offers to negotiators seeking to craft peace processes and final agreements are those which Blix and Emerson provide examples of in their *Treaty Maker's Handbook*,¹⁰⁶ i.e., the types of agreements and provisions that international legal practice has developed for recording in a binding, written fashion the various aspects of a "meeting of the minds" between two contending parties. Types of agreement include, for example, declarations of principles, implementation memoranda, protocols, and "notes for the record." Types of provisions include chapeaux, jurisdictional provisions, definitional provisions, and entry into force provisions. Another type of building block might be roughly defined as "mechanisms": these include 1) the many different types of practical commitments and processes, set out in an agreement, that can be used to advance towards the parties' goals, including elections, transitional periods, anti-incitement provisions, redeployments, and delegations of power; and 2) the many different types of conceptual tools or methodologies upon which the parties can rely to reflect in the legal text their level of agreement, including specificity, ambiguity, paralleled reciprocity, and open-ended gradualistic processes.

As we discussed, many compliance-pull factors are predetermined by the parties' history, nature, and place in the international community. The creative use of building blocks, on the other hand, is where a treaty's negotiators have the opportunity to make the most of the compliance-pull potential that is left. The building blocks, and especially the mechanisms, are also the key points where the international legal rubber meets the road. On a day-to-day basis, it is, for example, the specifics of an agreement's anti-incitement provisions that will

106. THE TREATY MAKER'S HANDBOOK (Hans Blix & Jirina H. Emerson eds., 1973).

govern one party's television programming and the other side's response to it. In other words, in the absence of a coercive Israeli censor sitting in the Palestinian television studio, it is the compliance-pull of the anti-incitement provisions, including their clarity and their coherence, that will play the key role in determining whether they are obeyed.

As mentioned above, little scholarly attention has thus far been paid to how peace process and agreement provisions can be designed so as to maximize the likelihood that parties will comply with them. This Part has provided an overview of the legal tools which peace process framers and agreement drafters can draw upon to maximize the likelihood of compliance. Parts IV and V of this Review will assess in more detail the pivotal effect on the parties' compliance of the extensive use in the Accords of two key mechanisms — ambiguity and open-ended gradualism. It is this author's hope that these Parts will make some small contribution to advancing the study of how peace process and agreement provisions can be designed so as to maximize the likelihood that parties will comply with them.

III. THE POSSIBILITY AND CONSEQUENCES OF BAD FAITH

Before addressing in detail pivotal, methodological aspects of the Oslo Accords, this Review must address the point of view that any inquiry into Oslo's failure to achieve its declared objective should begin and end with Yasser Arafat's unwillingness to make peace with Israel on any terms. At a March 13, 2003, Congressional hearing, Secretary of State Colin Powell, in discussing the lack of progress toward an Israeli-Palestinian peace settlement, said that "[t]he principal problem has been the continuing violence and terrorism that has come from the Palestinian side directed against the State of Israel."¹⁰⁷ Powell continued, "We had made it clear to the Palestinian side that they needed to bring up new leadership because the old leadership was not getting the violence under control and was not coming forward with initiatives or ideas that would help us build a dialogue with Israel."¹⁰⁸

Powell was referring, of course, to the June 24, 2002, Rose Garden speech in which President Bush said that "peace requires a new and different Palestinian leadership," and called "on the Palestinian people to elect new leaders, leaders not compromised by terror" be-

107. *Powell Faults Palestinians in Mideast*, ASSOCIATED PRESS, Mar. 13, 2003, available at <http://www.nytimes.com> (last visited Sept. 10, 2003).

108. *Id.*

cause “[t]oday, Palestinian authorities are encouraging, not opposing, terrorism.”¹⁰⁹

In discussing President Bush’s June 24, 2002, speech, National Security Adviser Condoleeza Rice said that the Palestinian leadership “has shown no ability or willingness, particularly willingness, to use its authority to fight terror”¹¹⁰ “Palestinian leaders,” Rice noted, “rejected a possibility of peace and a state from an Israeli Prime Minister who was willing to go further than anybody ever thought.”¹¹¹ “This administration,” said Rice, “has tried with the current Palestinian leadership to make progress, but all that we’ve gotten in return is continued activities that support and encourage terror.”¹¹² “How,” asked Rice, “can you work with a leadership that on one hand says it wants the peace process and on the other hand continues to work with terrorists who are undermining the peace process?”¹¹³

Joel Singer, Israel’s attorney who joined the process while it was still in its early stages in Oslo, has stated that “Oslo did not die from a thousand pinpricks . . . the problem was and is that the Palestinians don’t have a leadership which is capable of making peace with Israel.”¹¹⁴ “The only issue,” he says, “lies outside the words of the agreement, and that is that the Palestinians are not ready for peace.”¹¹⁵

A thorough analysis of the causes of Oslo’s failure needs to take into account the possibility that a successful deal was impossible because Yasser Arafat was from the beginning acting in bad faith.¹¹⁶ Not surprisingly, bad-faith negotiation in implementation of an

109. Press Release, White House, President Bush Calls for New Palestinian Leadership (June 24, 2002), at <http://www.whitehouse.gov>.

110. *Insight* (CNN International Television Broadcast, July 1, 2002) (transcript available in LEXIS, Nexis Library).

111. Press Briefing by National Security Advisor Dr. Condoleeza Rice (June 27, 2002) (transcript available in LEXIS, Nexis Library).

112. *Meet the Press* (NBC television broadcast, June 30, 2002) (transcript available in LEXIS, Nexis Library).

113. Kenneth R. Bazinet, *U.S.: Arafat in Rearview Mirror*, DAILY NEWS (New York), July 1, 2002, at 9.

114. Telephone Interview with Joel Singer, Israel’s Attorney (Feb. 11, 2003).

115. *Id.*

116. See, for example, Dennis B. Ross, *Think Again: Yasir Arafat*, FOREIGN POL’Y, July 1, 2002, at 18-19 (“Is there any sign that Arafat has changed and is ready to make historic decisions for peace? I see no indication of it.”). See also the noted left-wing Israeli historian Benny Morris who, in writing that recent “Palestinian behavior” has “provided the unhappy ground for a serious re-examination of my own political assumptions,” posits “the possibility that Oslo, from Arafat’s perspective, may have been a giant act of duplicity.” Arafat, notes Morris, “told a Muslim audience in a Johannesburg mosque in 1994 that he was willing to play along in order to win concessions but without ever intending to sign a final peace treaty that recognized Israel’s permanent legitimacy and permanent boundaries.” Benny Morris, *Bleak Conclusions from the History of a People*, NEW REPUBLIC, Apr. 21, 2003-Apr. 28, 2003, at 31.

agreement to negotiate towards agreement is a violation of customary international law. Article 26 of the Vienna Convention on the Law of Treaties codifies the requirement, stating that every international agreement in force "is binding upon the parties to it and must be performed by them in good faith."¹¹⁷ The Vienna Convention does not itself contain a definition of either good or bad faith, but Article 2.5 of the Unidroit Principles contains the following definition of "bad faith" which seems particularly appropriate for an "agreement to agree" of the Oslo type: "it is bad faith, in particular, for a party to enter into or continue negotiations intending not to reach an agreement with the other party."¹¹⁸

One might note that if Yasser Arafat entered into the Oslo process in bad faith, it would, notwithstanding Kim Jong Il and Saddam Hussein, be a relatively rare phenomenon on the international scene. According to Richard Bilder, "in almost all cases nations carry out their agreements in good faith."¹¹⁹ As Bilder puts it, "a fear that nations enter into international agreements with the idea of cheating or tricking the other party assumes a Machiavellian rationality and flexibility of which most governments are not capable in the real world."¹²⁰ It is obviously hard to imagine a democracy, with its checks and balances and relatively open decisionmaking, entering into an agreement in bad faith. It is less difficult to imagine a dictatorship, where all decisionmaking is ultimately in the head of one man, so doing.

It may ultimately be impossible to know whether or not Yasser Arafat intended to keep his word when he wrote to Yitzhak Rabin on September 9, 1993, that "[t]he PLO commits itself . . . to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations" and that "the PLO renounces the use of terrorism and other acts of violence."¹²¹ As Dennis Ross — the lead U.S. negotiator for most of the Oslo process, including Camp David — put it:

117. See WATSON, *supra* note 8, at 124.

118. Quoted in Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 TUL. EUR. & CIV. L.F. 97, 152 (1997).

119. RICHARD B. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* 8 (1981). Or as Louis Henkin asserted in *How Nations Behave* in 1968, "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." HENKIN, *supra* note 76, at 42. Writing some thirty years later, Harold Koh opined of Henkin's assertion that "empirical work since then seems largely to have confirmed this hedged but optimistic description." Koh, *supra* note 87, at 2599. But see Haas, *Choosing to Comply*, *supra* note 86, at 44, who says that "[t]he lawyers' dictum that 'most treaties are complied with most of the time' is surely premature, and probably exaggerated."

120. BILDER, *supra* note 119, at 9-10.

121. Letter from Arafat to Rabin (Sept. 9, 1993), *reprinted in* WATSON, *supra* note 8, at 315.

You couldn't conclude [the conflict], as it turned out, because you had someone like Yasser Arafat, for whom ending the conflict in many ways required ending himself. He was defined by conflict. He was defined by struggle. He was defined by the cause. To end it was something that was more than he could do, because it meant giving up his mythologies . . . Yasser Arafat . . . simply was not up to the task.¹²²

But the possibility of such bad faith, whenever it may have entered into play, does not mean that the only lesson to be learned from Oslo's failure is the danger of signing agreements with the likes of Yasser Arafat. Neither the Israelis nor the Palestinians are going to go away, and Yasser Arafat is certainly not going to be around forever. Indeed, if the vast majority of the commentators, from across the spectrum, in *Lessons of Failure* are right, analysis of the flaws of the Oslo process is essential for at least two reasons. First, the open-ended gradualism and ambiguity of the Oslo Accords clearly had a corrosive effect in and of themselves, as this Review will discuss. There are lessons to be learned from this that are generally applicable to designing peace negotiations and peace agreement texts to maximize compliance with their terms. Second, any peace deal the Israelis and Palestinians ultimately reach will likely use the Oslo Accords as a point of departure. This will be in keeping with the past history of Arab-Israeli peace negotiations, over the course of which, as Stein and Lewis report: "Yesterday's rejected or ignored proposal, document, or procedure may become tomorrow's accepted agreement, newly adopted position, or process."¹²³ If this is the case, it is critical to understand which aspects of the Oslo Accords should, on the basis of experience thus far, be disqualified from reappearing irrespective of the leader on the Palestinian side of the deal.

IV. OPEN-ENDED GRADUALISM

The first problematic methodology on which the Oslo Accords heavily relied was open-ended gradualism. "Open-endedness" is this Reviewer's term for the Oslo Accords having left virtually completely "open for a later agreement"¹²⁴ the fundamental question of what a permanent-status agreement between the Israelis and Palestinians would look like. Terje Roed-Larsen defined the separate but related concept of "gradualism" as "moving gradually forward and building trust along the way."¹²⁵ This Part focuses first on open-endedness and then on gradualism.

122. *Q & A with Jim Clancy* (CNN International television broadcast, Dec. 26, 2002) (transcript available in LEXIS, Nexis Library).

123. STEIN & LEWIS, *supra* note 10, at 25-26.

124. Singer, *supra* note 26.

125. Roed-Larsen, *supra* note 32, at 6.

In the opening essay to *Lessons of Failure*, Robert Rothstein starkly notes of the Oslo Accords that “much was left unresolved by Oslo — nearly everything of substance.”¹²⁶ Indeed — and this cannot be emphasized enough — almost none of the over one thousand pages of agreements, annexes, maps, and other documentation¹²⁷ that constitute the Oslo Accords say anything at all about the terms of a final agreement.

The full name of the DOP is the “Declaration of Principles on Interim Self-Government Arrangements.” Although the full title is rarely used, it is entirely appropriate to the Declaration, the provisions of which relate almost entirely to interim-status issues. Indeed, of the seventeen articles in the Declaration of Principles, only the Preamble, Article I (titled “Aim of the Negotiations”), and Article V (titled “Transitional Period and Permanent Status Negotiations”) provide any clues about the permanent-status negotiations, let alone the terms of a final settlement.

The preamble states in relevant part:

The [parties] agree that it is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.¹²⁸

Article I states:

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority . . . for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.

It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.¹²⁹

Article V states in relevant part:

2. Permanent status negotiations will commence as soon as possible, but not later than the beginning of the third year of the interim period, between the Government of Israel and the Palestinian people representatives.

3. It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, bor-

126. Robert L. Rothstein, *A Fragile Peace: Could a “Race to the Bottom” Have Been Avoided?*, in *LESSONS OF FAILURE*, pp. 1, 4 [hereinafter Rothstein, “Race to the Bottom”].

127. See KLEIMAN, *supra* note 22, at 57.

128. DOP Preamble, *reprinted in* WATSON, *supra* note 8, at 317.

129. DOP Article I, *reprinted in* WATSON, *supra* note 8, at 317.

ders, relations and cooperation with other neighbors, and other issues of common interest.

4. The two parties agree that the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached for the interim period.¹³⁰

That is it. The DOP contains no further guidance on final-status issues. As Joel Singer, the lawyer on the Israeli government team which negotiated the DOP, has put it, the DOP is "conspicuously silent about the form the permanent status arrangements will take," and "the principle that all options should be left open is explicitly stated in Article V(4)."¹³¹

The other Oslo Accords add virtually nothing to this extreme vagueness about permanent status. Nowhere do any of the Oslo Accords mention the possibility of Palestinian statehood. Thus, with respect to permanent status, the Oslo Accords could be characterized as an agreement to agree with all options (except a resort to violence) left open.¹³²

International agreements, including international peace agreements, are of course basically a form of contract. Because legal systems have much more experience with commercial contracts than with peace contracts, it is worth taking a moment to examine what contract law has to say about the sort of open-endedness at the heart of the Oslo Accords.

An 1857 quote from a member of the House of Lords, reported by Farnsworth, pithily summarized the attitude of traditional contract theory towards open-ended agreements: "An agreement to enter into an agreement upon terms to be afterwards settled by the parties is a contradiction in terms. It is absurd . . ."¹³³ The traditional view is that "no contract can be formed until clear and complete agreement is reached on material terms."¹³⁴ In straying from that principle, the DOP is consistent with a recent trend in commercial contract law towards believing that "preliminary agreements serve a valuable function in the marketplace."¹³⁵ As Farnsworth recognizes, the concept of an agreement "that is made during negotiations in anticipation of some later agreement that will be the culmination of negotiations" is

130. DOP Article V, reprinted in WATSON, *supra* note 8, at 318.

131. Joel Singer, *The Declaration of Principles on Interim Self-Government Arrangements: Some Legal Aspects*, JUST., Winter 1994, at 4, 13.

132. *Id.* at 5.

133. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 264 (1987).

134. Kostritsky, *supra* note 29, at 623 n.2. (quoting EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 411-12 (4th ed. 1991)).

135. *Id.* at 5.

now reflected in a number of commercial legal tools, including letters of intent, commitment letters, binders, agreements in principle, and memoranda of understandings.¹³⁶

One pair of commentators has written:

Recent changes in modern international transactions have led to an increased reliance on precontractual instruments. Commercial transactions are increasingly consummated between parties of diverse cultural and legal traditions. Parties are often unfamiliar with the ethical rules and legal ramifications of the negotiating process in other countries, which may lead the parties to write out their goals at a relatively early stage of the negotiation.¹³⁷

Because cultural and legal differences increase the risk of misunderstanding and “impede[] the development of personal trust,” these differences “increas[e] the perceived need for written protection” at a relatively early stage of the process.¹³⁸ The use of agreements to agree seems to be particularly common in international joint-venture negotiations. In such negotiations — as with Oslo — there is “a meeting, and sometimes, a clash, of two cultures,” and the process of negotiating the interim and final agreements is an “integral” part of the bridge-building.¹³⁹

But a critical factor distinguishes the Oslo Accords from the preliminary agreements with open terms in the commercial world. Courts are available to resolve commercial disputes or, in certain circumstances, even to impose reasonable contract terms. For example, as the Uniform Commercial Code notes, courts can determine and supply the price term — “a reasonable price at the time for delivery” — should negotiations on price fail with respect to a binding agreement for the sale of goods that leaves the price open for later determination by the parties.¹⁴⁰ And international joint-venture attorneys know that “[a]lthough parties to joint venture negotiations are not eager to confront the possibility of deadlock, it is always a good idea to include provisions governing what happens when the parties cannot agree.”¹⁴¹ Because commercial assets are relatively easy to value and there is

136. Farnsworth, *supra* note 133, at 249-50.

137. John Klein & Carla Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 HOUS. J. INT'L L. 1, 8 (1994).

138. *Id.*

139. Michael E. Hooton, *Structuring and Negotiating International Joint Ventures*, 27 CREIGHTON L. REV. 1013, 1014 (1994). Hooton notes that one example of the challenges of negotiating international joint ventures is “the highly publicized McDonald’s joint venture [in Russia which] took over twelve years to negotiate.” *Id.* at n.6. Compared to this example, five years may not have been a long time to develop a permanent peace settlement between the Israelis and Palestinians.

140. Farnsworth, *supra* note 133, at 253 (quoting U.C.C. § 2-305(1) (1978)); *see also id.* at 286.

141. Hooton, *supra* note 139, at 1028.

considerable precedent for courts supplying terms or arbitrators allocating the assets of a failed joint venture, commercial parties enter into preliminary agreements with a good sense of what the other party might reasonably have in mind and considerable certainty as to the bounds of what might happen if the parties reach deadlock.

The Oslo Accords present a sharp contrast. They constitute an agreement to agree with all options (except violence) left open, and no clear sense of what each others' bottom lines might be — in fact the parties avoided discussing their bottom lines at Oslo. Yet, the agreements provided no strong mechanism to govern what would happen if the parties turned out to be unable to reach an agreement. If the majority of contributors to *Lessons of Failure* agree on any one thing, it is that the gradual, open-ended aspects of the Oslo process, so carefully designed to foster trust, in fact did the opposite — they corrosively eroded trust. As Rob Malley, a member of the Clinton Administration negotiating team for the Oslo Accords, and Hussein Agha of Oxford University have written, “[t]he incrementalism of the previous decade . . . did not fail as a result of the parties’ ill will or a lack of faithful implementation; rather, it was the approach that contributed to both.”¹⁴²

There are several reasons why the open-endedness of the Oslo process may have done more to foster ill will and discourage implementation than to create trust, encourage compliance, and promote forward movement towards peace:

- Other Side’s Motives Left Unclear: Because neither party made a commitment regarding final status, each party continued to doubt the other’s good faith. The Accords’ failure to delineate the conflict-ending concessions that each party would make meant that, at any given stage, one side could suspect that the other side’s

shift toward peace is merely tactical, a platform to raise new demands or to achieve ancient goals by slower and at least momentarily less violent means. The fear of being duped is especially strong . . . because . . . the consequences of being wrong about the intentions of the other could be catastrophic for both leaders and followers.¹⁴³

Many Israelis, for example, feared that the PLO was simply implementing its infamous “doctrine of stages,” by which the PLO would establish itself on whatever piece of Palestine it could get, with the intention of using that as a staging ground “to achieve . . . the aim of completing the liberation of all Palestinian territory,”

142. Hussein Agha & Robert Malley, *The Last Negotiation: How to End the Middle East Peace Process*, in *THE MIDDLE EAST IN CRISIS* 61 (Council on Foreign Relations ed., 2002).

143. Rothstein, “*Race to the Bottom*,” *supra* note 126, at 7.

including all of Israel.¹⁴⁴ Many Israelis feared that for the Palestinians — and particularly for Yasser Arafat — the interim period was a cynical “peace” of the kind that Ambrose Bierce defined as “a period of cheating between two periods of fighting.”¹⁴⁵ Meanwhile, as historian Rashid Khalidi has put it, many Palestinians feared that

Oslo gave [the Israelis] the luxury of another decade, during which . . . the people who were paving the West Bank and turning it into an extension of Israel have gotten another 100,000 Israelis settled there, have paved hundreds of miles of roads, and are even less likely to give up these territories than they might have been a decade or more ago.¹⁴⁶

Thus many Palestinians feared that the implementing agreement would “de facto [come to represent] the permanent status agreement.”¹⁴⁷

- Each Side’s Gains Continued to Be Small Enough to Risk Losing: The Accords’ failure to specify, let alone immediately provide, the major, conflict-ending gains that each party was to eventually receive meant that neither side had a stake in the agreements’ success that was so large that they were unwilling to risk losing it.¹⁴⁸ Thus, as Palestinian professor Khalil Shikaki stated: “Oslo’s open-endedness . . . meant that neither side would make a full commitment to the peace process.”¹⁴⁹ Neither side had made, or clearly stood to make, a gain sufficiently large as to induce such a commitment.
- It’s Harder to Aspire to a Hazy Final Status: Because the Accords specified so little about the ultimate arrangements, leaders on both sides had no vision to sell to their people. *Breakthrough* notes that “developing an attractive vision of a desirable future” can pull people “forward toward agreement” (p. xx). John Paul Lederach points out that, in intrastate conflicts, “the futures of

144. Yossi Ben-Aharon, *Foundering Illusions: The Demise of the Oslo Process, in LESSONS OF FAILURE*, pp. 59-60.

145. Justus R. Weiner, *Wye River Memorandum: A Transition to Final Peace?*, 24 HASTINGS INT’L & COMP. L. REV. 1, 62 (2000) (quoting AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* (T.Y. Cromwell 1979) (1911)).

146. *Morning Edition* (National Public Radio broadcast, Oct. 8, 2002) (transcript available in LEXIS, Nexis Library).

147. Justus R. Weiner, *An Analysis of the Oslo II Agreement in Light of the Expectations of Shimon Peres and Mahmoud Abbas*, 17 MICH. J. INT’L L. 667, 699 (1996) (reviewing SHIMON PERES, *BATTLING FOR PEACE: A MEMOIR* (1995) and MAHMOUD ABBAS, *THROUGH SECRET CHANNELS* (1995)).

148. Rothstein, “*Race to the Bottom*,” *supra* note 126, at 5.

149. Khalil Shikaki, *Ending the Conflict: Can the Parties Afford It?*, in *LESSONS OF FAILURE*, pp. 37, 40.

those who are fighting are ultimately and intimately linked and interdependent.” Accordingly, it is particularly important that the “[o]ppportunity . . . be given for people to look forward and envision their shared future.”¹⁵⁰ Yet, because it was so open-ended, Oslo gave leaders on both sides very little material they could use to sketch a promising future to which their peoples could aspire. Rothstein notes that “it is hard to build a constituency for peace when the shape of the peace remains unclear and unsettled.”¹⁵¹ As Manuel Hassassian, the Executive Vice President of Bethlehem University, put it, Oslo’s open-endedness put on people “pressure to give up long-held values while not knowing what they will get in return.”¹⁵²

- **Progress Left Hostage to Extremists:** The Oslo process began with unofficial contacts which, when they proved promising, were turned into official negotiations. Ron Pundak was one of the two Israeli academics who started the unofficial process. Pundak eventually concluded of the Accords that “[o]utstanding issues . . . leave the agreement hostage to extremists on both sides, who . . . continue to fight in order to thwart the possibility of concluding these issues in future negotiations, and thereby leave the process of peace and reconciliation at their mercy.”¹⁵³ The mounting damage caused by these extremists, and particularly the Palestinian terrorists, was one key factor that gradually sapped the Accords’ legitimacy.
- **Both Sides Continually Seek to Improve Their Positions for Final Negotiations:** As Palestinian pollster Khalil Shikaki observed, “since ‘real’ negotiations have not even started, both sides sought to improve their negotiating positions.”¹⁵⁴ Rob Malley and Hussein Agha agree, saying “both sides treated the interim period . . . as a mere warm-up to the final negotiations; not as a chance to build trust, but as an opportunity to maximize their bargaining positions.”¹⁵⁵ In a similar vein, Joel Singer noted that

150. LEDERACH, *supra* note 2, at 27.

151. Rothstein, *Are There Only Lessons*, *supra* note 30, at 163.

152. Manuel Hassassian, *Why Did Oslo Fail? Lessons for the Future*, in LESSONS OF FAILURE, pp. 114, 116.

153. Ron Pundak, *From Oslo to Tabá: What Went Wrong?*, in LESSONS OF FAILURE, pp. 88, 105. Israeli journalist Ze’ev Schiff has written of this phenomenon as follows: “Both sides, the Israelis and the Palestinians equally and in fact also the American mediators, did not understand that prolonged procrastination in the implementation of sensitive agreements opens the door to actions by extremists on both sides, the aim of which is to torpedo any compromise.” Ze’ev Schiff, *The lies after Oslo*, HAARETZ, May 30, 2002, available at <http://www.haaretzdaily.com>.

154. Shikaki, *supra* note 149, at 40.

155. Agha & Malley, *supra* note 142, at 51.

the interim period established by Oslo in some ways resembled a cease-fire: "If you know a cease-fire is being negotiated and you have two more days to do whatever you can do before it is imposed . . . you use those last two days to improve your position. In this case, instead of two days we have five years."¹⁵⁶

- Each party may have emphasized position improvement even more once relations between the parties started to plunge. For example, when Arafat threatened to resume the intifada against Israel, then Foreign Minister Ariel Sharon "reacted by telling Jewish 'settlers to run and capture as many hills as possible Everything we don't take will eventually get into the hands of the Palestinians.'" ¹⁵⁷ One scholar has written that open-ended processes like Oslo are liable to be treated not as a "framework for incubating trust and reconciliation, but as an array of legalistic and definitive limits for the opposing side versus an array of loopholes and opportunities for the aggressive, adversarial exploitation of opportunities for one's own side."¹⁵⁸ Rothstein concludes that "the result was a peace process that became the continuation of conflict by other means."¹⁵⁹ This was another dynamic that gradually sapped the Accords of their legitimacy. The more steps a party took that maximized its bargaining position for the end game, but violated the Accords, the less the other party felt inclined to comply with the Accords.
- Open-endedness Enables Leaders to Feed Dangerous Expectations: The open-endedness of the Oslo texts "allowed each side to make contrary claims at home," writes David Makovsky. "Israeli leaders," explains Makovsky, "were able to continually promise their constituents what they wanted — including a united Jerusalem under Israeli sovereignty — while Arafat could promise his people what they wanted — including the right of return for all Palestinians to long-abandoned homes inside Israel." Arafat, he says,

sold Oslo to his public by telling them it guaranteed a return to the 1967 lines and entailed no compromises. He led his people to believe that they would get 100 percent of the land they wanted. This unsurprisingly led to unrealistic expectations and the explosion of

156. Joel Singer, *A Very Bad Agreement, but the Only Agreement Possible*, MIDDLE EAST FORUM, Mar. 19, 1997, at <http://www.meforum.org/article/322>.

157. Weiner, *supra* note 145, at 33 (quoting Danna Harman et al., *Arafat Warns: Our Rifles Are Ready*, JERUSALEM POST, Nov. 17, 1998, at 1) (ellipsis and internal quotation marks in Weiner)).

158. Ian S. Lustick, *The Oslo Agreement as an Obstacle to Peace*, 27 J. PALESTINE STUD. 61, 62 (1997).

159. Rothstein, *Are There Only Lessons*, *supra* note 30, at 18.

frustration (egged on by the PA) that followed the failure of Camp David.¹⁶⁰

Oslo's framers hoped that during the interim period the gradually increasing cooperation between the two sides, and the concessions of each side to the other, would build trust that would outweigh the dangers of leaving the process open-ended. But, instead, open-endedness only increased the distrust. Ultimately, distrust infected the process and prevented the slowly increasing cooperation and gradual concessions that were supposed to overcome it. Because the two sides were unclear as to the goals they were trying to achieve by making concessions, they had difficulty selling the concessions to their people. Concessionary "[s]teps that might have been easy to win support for domestically if packaged as part of a final agreement were condemned as unwarranted concessions when carried out in isolation."¹⁶¹

The open-ended gradualism of the Accords engendered several problems in addition to those caused by the open-endedness of the gradual process's destination. Gradualism turned out to be a severe detriment in and of itself. For example, the almost continual negotiations and renegotiations which were required by Oslo's gradual approach meant that the Accords were unable to benefit from the transaction cost savings, which Chayes and Chayes identify as a key factor encouraging compliance with treaty rules.¹⁶² Chayes and Chayes point out that "[g]overnmental resources for policy analysis and decisionmaking are costly and in short supply" and governments "seek to conserve these resources for the most pressing and urgent matters."¹⁶³ Since "continuous recalculation" of treaty provision costs and benefits expends such resources, Chayes and Chayes conclude that rote compliance with established treaty provisions "saves transaction costs."¹⁶⁴ Since the gradualistic approach of the Oslo Accords meant that many of the treaty provisions governing Israeli-Palestinian relations were regularly being reconsidered and/or changing, the Oslo Accords were rarely able to benefit from the compliance-promoting efficiencies of routinization. Instead, governmental resources for policy analysis and decisionmaking on both the Israeli and the Palestinian sides were regularly being expended to calculate the costs and benefits of incremental changes. This may have resulted in too few resources being left available for addressing the most urgent and pressing permanent-status issues.

160. David Makovsky, *Middle East Peace Through Partition*, in *THE MIDDLE EAST IN CRISIS*, *supra* note 142, at 10.

161. Agha & Malley, *supra* note 142, at 51.

162. CHAYES & CHAYES, *supra* note 80, at 4.

163. *Id.*

164. *Id.*

The frequent and unpredictable changes to roads, borders and border procedures, tax collection procedures, and other economic practicalities that were occasioned by Oslo's gradualistic evolution also made it hard for business, which hungers for stability and predictability, to develop a vested, material interest in the Accords. At the same time, the scale of the many individual agreements was too small to engender encouragement by outsiders of the sort that might have helped positively influence implementation by the parties. As Malley puts it, "the succession of piecemeal, incremental agreements made it more difficult to mobilize the support of other countries."¹⁶⁵

Manuel Hassassian, the Executive Vice President of Bethlehem University, contends that the succession of minor, interim agreements also caused the two publics to become increasingly skeptical as to the value of agreements between the two sides: "What made the situation . . . incomprehensible to the public on both sides is that agreements were signed one after the other, yet on the ground things were not improving."¹⁶⁶ Hassassian notes:

After agreements were signed, and the handshakes and the hugs, the next day was business as usual in terms of the actual conflict on the ground. An agreement was followed with an implementation protocol, then another protocol for the implementation of the implementation protocol. The process was simply no longer credible . . .¹⁶⁷

Rob Malley and Hussein Agha contend that gradualism also increased friction between the two leaderships, noting that "[b]y multiplying the number of obligations each side agreed to, the successive interim accords increased the potential for missteps and missed deadlines."¹⁶⁸ "Each interim commitment," says Malley, "became the focal point for the next dispute and a microcosm for the overall conflict, leading to endless renegotiations and diminished respect for the text of the signed agreements themselves."¹⁶⁹ Thus, the open-ended gradualism of the Oslo Accords not only failed to build trust and confidence, it created a dynamic that in many ways over time actually eroded the Accords' legitimacy.

The detriments of Oslo's open-ended, gradual approach have led virtually every one of the *Lessons of Failure* commentators who believe peace is possible to the conclusion that the Oslo process would have been better off with much greater clarity as to final status from the very beginning. Irrespective of whether such was possible in 1993,

165. Agha & Malley, *supra* note 142, at 51.

166. Hassassian, *supra* note 152, at 119.

167. *Id.*

168. Agha & Malley, *supra* note 142, at 51.

169. *Id.*

they each believe that getting the parties to agree to at least a broad outline of the final settlement is imperative now.

Ron Pundak suggests that “while its implementation could be — and perhaps should be — gradual,” the outlines of a permanent-status agreement must be made clear to both sides.¹⁷⁰ Hassassian agrees, saying that “there should have been general agreement from the beginning on the key issues. It is the details that can be worked out step by step, but not the guiding principles. In fact, the problem with the guiding principles adopted in Oslo is that they were too vague.”¹⁷¹ Israeli professor Moshe Ma’oz believes that:

an Israeli vague commitment regarding the creation of a Palestinian state in the West Bank and Gaza say, within five years, with a certain status in East Jerusalem to be negotiated could have served as a strong incentive to the PLO to fully and credibly implement its commitments to Israel, particularly in the arena of security.¹⁷²

“In return,” says Ma’oz, “the PLO could have allayed Israeli concerns had it committed itself at Oslo to implement the Palestinian refugees’ ‘right of return’ in the future Palestinian state, not in the state of Israel proper.”¹⁷³

The failed “Road Map” set forth by the Bush Administration in the winter and spring of 2003 was in one respect much clearer than the Oslo Accords had been as to the ultimate goal of the Israeli-Palestinian peace process. The Road Map included an explicit commitment to the goal of creating a Palestinian state, an historic concession from the Israeli perspective.¹⁷⁴

But the Road Map left further details regarding the Palestinian state, including its borders and other potential attributes (e.g., demilitarized status), unspecified. As Max Abrahms writes in a Los Angeles Times op-ed, “The road map takes off where Oslo failed. It again postpones the difficult final-status issues.”¹⁷⁵ Khalil Shikaki says the Road Map “didn’t give the Palestinians enough incentive to move forward” because it left too open “what they would be getting in the end” with respect to borders, settlement removal, and degree of limitations on sovereignty.¹⁷⁶ The Road Map also left too much open

170. Pundak, *supra* note 153, at 106.

171. Hassassian, *supra* note 152, at 127.

172. Moshe Ma’oz, *The Oslo Peace Process: From Breakthrough to Breakdown*, in LESSONS OF FAILURE, pp. 133, 135.

173. *Id.*

174. See Press Statement, Office of the Spokesman, U.S. Dep’t of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003), available at <http://www.state.gov/r/pa/prs/ps/2003/20062pf.htm>.

175. Max Abrahms, Editorial, *Road Map Torn by Ambiguity*, L.A. TIMES, May 28, 2003, at B13.

176. Charles A. Radin, *Some See End of Road for Abbas, Peace Plan*, BOSTON GLOBE,

from an Israeli perspective. For example, on the Palestinian “right of return,” which the Palestinians must concede if the Israelis are to agree to a permanent agreement, the “Road Map” contained no significant concessions. Thus both Israelis and Palestinians were left to feel that the Road Map was still too open-ended.

In addition, the Road Map’s complex list of phases and steps suffered from the same gradualism problems as did the Oslo Accords. Hussein Agha and Robert Malley describe the Road Map’s problems as follows:

The Bush administration’s road map . . . is faltering — because of its own deficiencies, not merely those of the negotiating parties. Like past peace plans, it is based on the idea that incremental stages will bring Israelis and Palestinians to the point where they can negotiate the issues that separate them.¹⁷⁷

“Because the ultimate solution remains up for grabs,” contend Agha and Malley, the Road Map “protagonists pursue policies designed to shape its contours rather than to promote a common enterprise. The vagueness of the goal and an excess of suspicion mean that neither side has an incentive to live up to its obligations in a wholehearted way.”¹⁷⁸ Agha and Malley add that “[e]ach incremental gesture becomes the focal point of the next crisis” and “[e]very additional step creates one more opportunity for a misstep or deliberate sabotage.”¹⁷⁹

Because the Road Map required that so many incremental steps be accomplished in such impossibly short time frames, it practically guaranteed that many steps would not be accomplished, thereby further undermining the credibility of the peace process and adding yet more to both sides’ lists of unkept commitments.¹⁸⁰ At the same time, the Road Map offered “no view as to what constitutes compliance (i.e., 100 percent effort, 100 percent results, or ‘reasonable effort producing passable results’?), nor does it prioritize which requirements are deal-breakers.”¹⁸¹ “In substance,” concludes Robert Satloff, “the roadmap fails to live up to claims to reflect lessons learned from the

Aug. 27, 2003, at A1.

177. Hussein Agha & Robert Malley, *Ditch the Road Map. Just Get There Already*, WASH. POST, Sept. 7, 2003, at B2.

178. *Id.*

179. *Id.*

180. See Robert Satloff, *Mideast Roadmap leads to a dead end*, BALT. SUN, Apr. 27, 2003, at 5C [hereinafter Satloff, *Mideast Roadmap*].

181. Robert Satloff, *The Road Not to Be Taken: Assessing the Quartet Roadmap for Israeli-Palestinian Peacemaking*, Peacewatch (Wash. Inst. for Near East Policy, Washington, D.C.), Oct. 23, 2002, available at <http://www.washingtoninstitute.org/watch/Peacewatch/peacewatch2002/402.htm>.

1993 Oslo peace accords.”¹⁸²

Some commentators in *Lessons of Failure* and elsewhere have come to the conclusion that the next step in the Oslo process should be imposition of a final agreement. One of the most prominent recent exponents of such an approach is Terje Roed-Larsen, who was one of the key, if not the key, initiators of the open-ended gradualism approach.¹⁸³ Another recent proponent of an imposed agreement is the Agha/Malley team, which argues that “the parties must be presented with a full-fledged, non-negotiable final agreement.”¹⁸⁴ But Agha and Malley disagree that “a permanent solution must await the building of trust between the two sides.”¹⁸⁵ They contend that “[m]istrust, enmity, and suspicion are the consequences of the conflict, not its cause.”¹⁸⁶ “A deal,” they say, “should not be made dependent on preexisting mutual trust; the deal itself will create it.”¹⁸⁷ But Agha and Malley fail to make a convincing argument for why the “full-fledged, non-negotiable agreement” they propose would lead to a better result than the “full-fledged, non-negotiable agreement” offered up by President Clinton or the Road Map which was “presented to Israel and the Palestinians as a *fait accompli*,” giving it “the dubious distinction of being the first U.S.-endorsed peace plan in decades that the local parties did not themselves negotiate.”¹⁸⁸ As National Security Adviser Rice has stated, the Palestinian leadership:

rejected a possibility of peace and a state from an Israeli Prime Minister who was willing to go further than anybody ever thought. Very strenuous efforts on the part of the United States under the Clinton Administration, and the current Palestinian leadership couldn't find its way to accept that. And so opportunity after opportunity after opportunity has been missed by this Palestinian leadership¹⁸⁹

If the Palestinian leadership, and especially Yasser Arafat, is fundamentally unwilling to end the conflict with Israel, no imposed solution will be able to make that leadership take the volitional steps of permanently calling off and disarming the terrorists and beginning a genuine and irreversible process of historic reconciliation.

Negotiations theorists tend to be skeptical of imposed solutions. *Breakthrough* warns that “a settlement that is imposed on the dispu-

182. Satloff, *Mideast Roadmap*, *supra* note 180.

183. See Roed-Larsen, *supra* note 32.

184. Agha & Malley, *supra* note 142, at 53.

185. *Id.*

186. *Id.*

187. *Id.*

188. Robert Satloff, *Don't treat the "road map" as gospel, and tread cautiously*, L.A. TIMES, May 18, 2003, at M1.

189. Press Briefing by National Security Advisor Dr. Condoleeza Rice, *supra* note 111.

tants is inherently unstable” because “[o]ne or more of the contending parties will view the settlement as illegitimate and feel free to violate its terms” once they get the opportunity (p. 93).

The lead American negotiator, Dennis Ross, believes for similar reasons that imposing a peace deal on the Israelis and Palestinians is “absolutely not” the right thing to do.¹⁹⁰ “If an imposed solution were possible and would hold,” says Ross, “I would be prepared to support it. But an imposed solution is an illusion.”¹⁹¹ Arafat, says Ross, “would certainly go along with an imposed outcome. He has always preferred such an option. It would relieve him of the responsibility to make a decision.”¹⁹² With an imposed agreement, says Ross, Arafat “can outwardly acquiesce, saying he has no choice. But inevitably, Palestinians will oppose at least part of an imposed outcome,” and may even create “newly discovered grievances” such as those that Hizbullah has fabricated to create excuses to attack Israel even after Israel’s full withdrawal from Lebanon.¹⁹³

“If one overriding lesson from the past persists,” says Ross, “it is that the Palestinians must make decisions and bear the responsibility of those decisions.”¹⁹⁴ “No enduring peace can be reached,” says Ross, “until the Palestinian leadership levels with its public, resists the temptation to blame every ill on the Israelis or the outside world, assumes responsibility for controversial decisions, and stands by its decision in the face of opposition.”¹⁹⁵ In fact, says Ross, “[a]n imposed solution will only delay the day when all sides, but especially the Palestinians, have to assume real responsibilities. Consequently, an imposed solution would be no solution at all.”¹⁹⁶

Irrespective of what the best way forward might be, it is clear that open-ended gradualism did not work. Indeed, it seems to have operated to frustrate the confidence and trust it was supposed to promote. It is obviously impossible to say whether an Oslo process devised to include fewer interim steps and a greater clarity as to final *status* — in other words, with less reliance on open-ended gradualism — would have brought peace by now. But future peace negotiators, whether in this or other conflicts, should be very hesitant to repeat Oslo’s “uniquely structured” methodological approach to peacemaking. The experiment failed.

190. Ross, *supra* note 116, at 24.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 26.

195. *Id.*

196. *Id.*

V. CONSTRUCTIVE AMBIGUITY

A second key methodological aspect of the Oslo Accords that was meant to facilitate reconciliation but that seems instead to have had, overall, the opposite effect is the Accords' extensive use of "constructive ambiguity." For the purposes of this Review, the use of "constructive ambiguity" in an agreement text means the deliberate use of vague, equivocal, or ambiguous language which, as discussed earlier, is capable of being interpreted by each of the parties as protecting their own interests and positions.¹⁹⁷

A variety of commentators have complained about the extent to which "constructive ambiguity" was used in the Oslo Accords. Watson speaks of "the constructive ambiguity that plagues all of the Accords."¹⁹⁸ Manuel Hassassian complains that the Oslo "implementation mechanisms were too ambiguous and the agreement meant different things to each side."¹⁹⁹ Edward Said has described the Oslo Accords as "an interpreter's nightmare, a patchwork of . . . deliberate ambiguities and obfuscations."²⁰⁰ Hanan Ashrawi has expressed her concern at "the gaps, ambiguities, lack of detail and absence of implementation mechanisms" in the DOP.²⁰¹ Ashrawi contended that the DOP contained so many "areas of ambiguity and friction, the agreement could backfire or implode at any time."²⁰² Israeli professor Aharon Kleiman, in his book, *Constructive Ambiguity in Middle East Peace-Making* ("Constructive Ambiguity"), dedicates several chapters to the ambiguities of the various Oslo Accords. The bottom line of his analysis is "the post-Oslo deadlock's total predictability because of its inordinately strong component of 'constructive ambiguity.'" ²⁰³

Kleiman helpfully outlines the history of reliance on constructive ambiguity in the Middle East conflict, "[s]tretching from the Balfour Declaration to the 1998 Wye River Memorandum" and beyond.²⁰⁴ He notes that a "growing penchant for papering over differences . . . represents one major point of continuity in the long . . . struggle for mastery over Palestine."²⁰⁵

Kleiman contends that the practice of constructive ambiguity may have first gained wide currency during Henry Kissinger's tenure as

197. See, e.g., BILDER, *supra* note 119, at 37-38; KLEIMAN, *supra* note 22, at 13.

198. WATSON, *supra* note 8, at 72.

199. Hassassian, *supra* note 152, at 119.

200. KLEIMAN, *supra* note 22, at 69.

201. *Id.* at 70.

202. *Id.*

203. *Id.* at 11.

204. *Id.* at 35.

205. *Id.*

National Security Adviser and Secretary of State.²⁰⁶ Kissinger's memoirs, notes Kleiman, "provide the most spirited, unabashed defense available anywhere of constructive ambiguity."²⁰⁷ Kleiman contrasts the Kissinger statement that "[s]ometimes the art of diplomacy is to keep the obvious obscured," with Kissinger's "derision for the efforts of his predecessor in crafting the 1969 Roger Plan of 1969 for an Arab-Israeli settlement: 'straightforward and unambiguous, it did not get far.'"²⁰⁸

In *Kissinger: A Biography*, Walter Isaacson provides the following compelling description of Henry Kissinger's use of ambiguity in peacemaking:

Where Kissinger's genius came into play, for better or worse, was in disguising some of the concessions, fudging controversial issues, and wrapping it all in creative ambiguity. Some might see the purpose of a peace accord as being to set forth in clear terms precisely what both sides have accepted. Kissinger approached it from a different perspective: on some fundamental disputes, he purposely devised language that could mean one thing to one side and something else to the other.²⁰⁹

A. *The Benefits of Ambiguity*

Notwithstanding Kissinger's genius for it, the use of ambiguity in peacemaking is a double-edged sword. The following are among the goals (some of them overlapping at the margins) that it can help achieve:

- **Completely Defer the Issue to Another Day:** Watson argues that the use of "deliberate ambiguity" in the Oslo Accords "allowed the parties to focus on those matters on which they could readily agree and to defer on those which they could not. . . . [T]he Oslo Accords demonstrate that it can be a useful tool for isolating and defusing deal-breakers."²¹⁰ Bilder emphasizes that "equivocal or ambiguous language can be particularly useful in helping the parties to bridge disagreements as to minor or more peripheral provisions of a proposed arrangement."²¹¹ He notes that "nations often use equivocal language to bypass such peripheral issues, leaving them to later negotiation should they arise and their solution prove necessary."²¹² Entirely bypassing an issue is a job for

206. *Id.* at 29.

207. *Id.* at 30.

208. *Id.* at 32.

209. WALTER ISAACSON, *KISSINGER: A BIOGRAPHY* 481-82 (1992).

210. WATSON, *supra* note 8, at 309.

211. BILDER, *supra* note 119, at 40.

212. *Id.*

exceptionally ambiguous language, and/or studied silence regarding the contentious issue. The question of Palestinian statehood, which was far from a minor or peripheral issue, was handled more or less this way in the Oslo Accords. Only a few vague references, such as those to “mutual legitimate and political rights,” even hinted at the existence of the question of whether the Oslo process would result in Palestinian statehood.

- **Establish Basis for Continued Negotiation of the Issue:** On occasion, negotiators do not wish to completely ignore an issue or wholly defer it to an unspecified future date. Instead, the negotiators wish to reference the issue in the agreement pending before them while keeping the issue from preventing closure on that agreement. They can achieve this with a provision specifically committing the parties to negotiate the issue within a different framework or at some future time. Richard Bilder notes that even where the parties cannot reach any common understanding as to an issue, ambiguous language “permits them at least to commit themselves to cooperative approaches to the problem.”²¹³ Simply including an issue in a written agreement, says Bilder, can help establish a basis for further negotiation, including perhaps “an institutional framework and negotiating parameters in which a more genuine agreement can, over time, be more easily achieved.”²¹⁴ This is more or less what the Oslo framers did in agreeing to eventually engage in permanent-status negotiations to “cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.”²¹⁵ While a procedural framework was established for negotiating the specified “remaining issues,” its substantive result was kept almost entirely open-ended.
- **Enable a Provision to Be Flexible:** “Flexible” provisions are able to bend in meaning to match changed needs and circumstances. Negotiators wishing to create flexible provisions will turn to ambiguous language because “excessive specificity in an agreement may lead to undesirable rigidity in application of the agreement and an inability of the parties to adjust their arrangement readily to changing circumstances.”²¹⁶ Even very ambiguous language can be valuable in documents such as constitutions which are meant to be flexible. This is especially so where the

213. *Id.* at 39.

214. *Id.*

215. DOP Article V, reprinted in WATSON, *supra* note 8, at 318.

216. BILDER, *supra* note 119, at 119.

authority to interpret and reinterpret the document is definitively vested in a specific institution, such as a supreme court.

- Mute Domestic Opposition: “Domestically,” notes Kleiman, constructive ambiguity “avoids confronting one’s opponents at home and being charged with weakness, with capitulation or with betraying the cause.”²¹⁷

B. *The Risks of Ambiguity*

The benefits of reliance on “constructive ambiguity” are accompanied by various risks, including the following:

- Harder to Hold Party to Less Clear Commitment: Generally speaking, the more vaguely a commitment is phrased, the harder it is to hold a party to it. If a nation “believes that its obligation is ambiguous or uncertain,” says Bilder, “it will see itself as in a better position to justify or excuse nonperformance or inadequate performance and to resist any application of sanctions.”²¹⁸ Vaguer texts are more open to what Franck calls “self-serving exculpatory definitions.”²¹⁹ A party can more readily deny that a particular action constituted a violation of a vaguely phrased commitment, and know that the uncertainty as to the violated commitment’s meaning may reduce the responses to the violation.²²⁰ Bilder therefore recommends that a nation which is concerned that another nation will not adequately perform its obligations under an agreement should “seek to describe the performance expected of the other nation as clearly and precisely as possible in the agreement.”²²¹ For this reason, say Chayes and Chayes, the United States has in the arms control field “opted for increasingly detailed agreements, on the ground that they reduce interpretive leeway.”²²² They note that the Strategic Arms Reduction Treaty signed in 1989 “is the size of a telephone book.”²²³
- Creates False Sense that Issue Is Resolved: Professor Bilder cautions that using constructively ambiguous language to paper over a failure to reach agreement on a particular issue can “relax the pressure on the parties to reach an agreement capable of really dealing with the problem involved, induce false public expecta-

217. KLEIMAN, *supra* note 22, at 137.

218. BILDER, *supra* note 119, at 118.

219. FRANCK, *supra* note 59, at 57.

220. HENKIN, *supra* note 40, at 70.

221. BILDER, *supra* note 119, at 118.

222. CHAYES & CHAYES, *supra* note 80, at 11.

223. *Id.*

tions, and, when these expectations are disappointed, lead to increased conflict and more difficulty in reaching real agreement.”²²⁴

- **Fosters False Sense of What Has Been Gained and Conceded:** Including ambiguous language in an agreement can foster not only a false sense that an issue is no longer of concern because it has been resolved; it can also foster dangerous misconceptions of what has been gained or conceded in an agreement. Professor Kleiman speaks disparagingly of “ambiguity’s employment as a tool for deception in domestic politics, where it leads an unknowing public to believe hard commitments have been extracted from the enemy in return for soft concessions, or none at all”²²⁵ Such a deception of a party’s own domestic public is, of course, particularly pronounced when ambiguous language in the agreement is given a more specific meaning elsewhere, such as in a secret side letter.
- **Increases Dependence on Third Party:** Using constructively ambiguous language to paper over failures to reach agreement can increase dependence on a third-party “honest broker” who becomes “indispensable” both for “stepping forward with vacuous but face-saving terminology”²²⁶ and for helping the parties resolve subsequent disputes over the meaning of the ambiguous language.
- **Sets Stage for Later Disagreement Between Parties:** Professor Kleiman uses particularly strong language to warn of the danger of “deferred confrontation.”²²⁷ He contends that “by leaving core values, issues or interests vague and unsettled,” the use of ambiguous language with respect to central issues “is guaranteed to be the source for later difficulties.”²²⁸ This danger is particularly pronounced where relations become so bad that parties try to stretch interpretations of ambiguous language recklessly far in favor of their own interests.
- **Feeds Disrespect for the Agreement:** Because human beings have a tendency to generalize from the particular to the whole, using ambiguous language to paper over disagreements in one area can risk undermining the legitimacy of other parts of the agreement. Parties that get in the habit of stretching ambiguous provisions may start trying to stretch clearer provisions. Commentators and

224. BILDER, *supra* note 119, at 38-39.

225. KLEIMAN, *supra* note 22, at 20.

226. *Id.* at 137.

227. *Id.* at 37.

228. *Id.* at 54-55.

other citizens who become aware of particular holes in an agreement may begin to assume the entire agreement is riddled with holes. As Louis Henkin notes of another peace agreement, "any doubt cast on the legal validity of any of the provisions would cast doubt on the whole."²²⁹ Professor Kleiman writes, in his analysis of ambiguity in the Oslo Accords, that "[t]he idea that Arab-Jewish understanding might be promoted by willfully perpetuating misunderstanding defies logic."²³⁰ "[W]here," he asks, "do artifice and deception in treaty drafting leave reconciliation in the deeper sense of a true meeting of the minds?"²³¹ "How," he continues, "can intentional ambiguity be reconciled with calls for transparency, candor and commitment in international relations?"²³²

It is worth noting that the use of ambiguity can create confusion, not only between the parties and amongst their respective publics, but in the minds of the negotiators as well. George Orwell warned of the danger in his 1946 essay entitled "Politics and the English Language." Orwell warned that the use of "euphemism, question-begging and sheer cloudy vagueness" is dangerous in part because it "anaesthetizes a portion of one's brain." Vagueness, said Orwell, is a "continuous temptation, a packet of aspirins always at one's elbow," which is surrendered to at the cost of creating confusion, "not only for your reader but for yourself."²³³

If many of the words and phrases in the Accords, and especially the seminal DOP, seem ambiguous to international law experts like Watson and others assessing them at their leisure in the light of experience and with vast scholarly resources at hand, there was surely enormous opportunity for the Palestinian negotiating team at Oslo to be either unclear or mistaken as to the agreement's meaning. Joel Singer, an experienced international lawyer, arrived in Oslo partway through the negotiations to join the Israeli delegation as their legal adviser. The Palestinian delegation chose not to have a legal adviser on their negotiating team. In his book *Through Secret Channels*, Mahmoud Abbas ("Abu Mazen"), the senior PLO leader who signed the DOP on behalf of the Palestinians, writes as follows:

I must admit that throughout the Oslo negotiations we did not review the texts with a legal consultant for fear of leaks. . . . I tried to make use of

229. HENKIN, *supra* note 40, at 80.

230. KLEIMAN, *supra* note 22, at 136.

231. *Id.* at 117.

232. *Id.*

233. GEORGE ORWELL, POLITICS AND THE ENGLISH LANGUAGE (1946), available at <http://www.mtholyoke.edu/acad/intrel/orwell46.htm> (last visited Sept. 11, 2003).

the remnants of the legal knowledge I had acquired while studying law at Damascus University, but I could not draw much comfort from them.²³⁴

Only “when all the outstanding points of difference had been resolved and it had been agreed to meet in Oslo to initial the DOP” did Abbas summon the PLO’s legal consultant, Taher Shash, from Cairo.²³⁵ Shash arrived in Oslo and “was met by Abu Ala who handed him the text of the DOP and asked him to review it and give his opinion. Shash studied it thoroughly, and a few hours later informed Abu Ala that it was a good text with no shortcomings.”²³⁶ Shash then returned to Cairo. A few hours later, the DOP was initialed in Oslo.²³⁷

C. *A Case Study of Ambiguity in the Oslo Accords: The Palestinian Charter Issue*

A prototypical example of the Accords’ disastrously counterproductive reliance on ambiguity involves the protracted effort to achieve deletion from the Palestinian National Charter (also known as the “Palestinian Covenant”) (“PNC” or “Charter”) of various objectionable clauses, including several Charter clauses calling for the destruction of Israel.

Yossi Ben-Aharon, former Director General of the Israeli Foreign Ministry, opines in *Lessons of Failure* that “[s]ome 25 out of 33 articles of that covenant” call “for the elimination of Israel.”²³⁸ Several Charter articles stand out as particularly inconsistent with the DOP. For example, Article 15 of the Charter states that “The liberation of Palestine . . . aims at the elimination of Zionism in Palestine.”²³⁹ Article 19 of the Charter states that “[t]he partition of Palestine in 1947, and the establishment of the state of Israel are entirely illegal, regardless of the passage of time.”²⁴⁰ Article 20 of the Charter states that “[c]laims of historical or religious ties of Jews with Palestine are incompatible with the facts of history.”²⁴¹ Article 21 of the Charter states: “The Arab Palestinian people . . . reject all solutions which are substitutes for the total liberation of Palestine.” Article 22 of the

234. MAHMOUD ABBAS, *THROUGH SECRET CHANNELS* 162 (1995).

235. *Id.* at 178-79.

236. *Id.* at 179.

237. *Id.* at 162.

238. Yossi Ben-Aharon, *supra* note 144, at 60.

239. Palestine National Charter (1968), available at <http://www.palestine-un.org/plo/frindex.html> and <http://www.palestine-net.com/politics> (last visited Sept. 11, 2003).

240. *Id.*

241. *Id.*

Charter states that the "liberation of Palestine will destroy the Zionist and imperialist presence."²⁴²

Procedures amending the Charter are specified in Article 33, which provides as follows: "This Charter shall not be amended save by a majority of two-thirds of the total membership of the National Council of the Palestine Liberation Organization at a special session convened for that purpose."²⁴³

At Oslo, the Israeli delegation insisted that the Palestinian side agree to eliminate those portions of the Charter that call for the destruction of the state of Israel. Yasser Arafat, in his capacity as Chairman of the PLO, responded to this request in his letter of September 9, 1993, to Prime Minister Rabin. Arafat first stated that "The PLO recognizes the right of the State of Israel to exist in peace and security." Then, at the end of the letter, he stated:

[T]he PLO affirms that those articles of the Palestinian Covenant which deny Israel's right to exist, and the provisions of the Covenant which are inconsistent with the commitments of this letter are now inoperative and no longer valid. Consequently, the PLO undertakes to submit to the Palestinian National Council for formal approval the necessary changes in regard to the Palestinian Covenant.²⁴⁴

Arafat's statement contains several ambiguities, including:

- 1) Which specific provisions are included in his reference to "those articles . . . which deny Israel's right to exist" and "the provisions . . . which are inconsistent with the commitments of" the letter? No list of affected provisions was provided.
- 2) What exactly are the "necessary changes" in regard to the Charter? No new draft or list of necessary changes was provided.
- 3) Since the Charter, by its own terms, cannot be amended except by a two-thirds vote of the PNC, what is the legal significance of an Arafat letter stating that the PLO "affirms" that certain articles "are now inoperative and no longer valid"?
- 4) What is the legal significance of the rather loose formulation that "the PLO undertakes to submit" the necessary changes to the PNC? It is not hard to imagine alternative formulations that would have provided much greater clarity. For example, "the PLO will immediately submit" would have bound the time within which the commitment was to be carried out. An addition to the end of the second sentence of a phrase like "and will take all necessary steps to advocate for and secure such approval" would

242. *Id.*

243. *Id.*

244. Letter from Arafat to Rabin (Sept. 9, 1993), *reprinted in* WATSON, *supra* note 8, at 315.

have committed the PLO to doing more than simply submitting the necessary changes.

- 5) What is the meaning of Arafat's reference to "formal approval" by the PNC of "the necessary changes in regard to the Palestinian Covenant"? Again, it is not hard to imagine an alternative formulation that would have provided much greater clarity. For example, Arafat's letter could have referred to "formal amendment of the Covenant by a 2/3 vote of the Council so that a new Covenant text is created which no longer contains the specified provisions which deny Israel's right to exist or which are inconsistent with the commitments of this letter."

The ambiguously worded Charter commitment in Arafat's September 9, 1993, letter turned out to be the first step in a game, of which Abbott and Costello would have been proud, that went as follows: 1) the Palestinians would claim to have performed their Charter-revision obligation, then 2) the Israelis would claim that the Palestinian act in question had not satisfied the obligation, then 3) the parties would agree on a revised but still ambiguous expression of the Palestinian commitment, followed by 1) then 2) then 3) and then 1) again and so forth. At each stage, the Palestinians would claim that the newly agreed formulation was the most to which they could commit. Some have posited that the Israelis may, at times, not have pushed as hard as they might have for a new Charter text out of concern that it might end up containing newly offensive, but perhaps harder to object to, provisions such as a declaration of Jerusalem as the future capital of Palestine. Whatever benefits the parties hoped to gain from the ambiguities they agreed to, the net effect was to make a mockery of the Oslo process and the Accords.

"[L]ittle progress was made towards amending the" Charter during the two years following the signing of the DOP.²⁴⁵ In response to Israeli dissatisfaction with this lack of progress, a new version of the Charter-revision obligation was agreed to and included at Article XXXI(9) of the Interim Agreement, which was signed in Washington on September 28, 1995.²⁴⁶ Unfortunately, this new provision also left unclear which specific provisions were to be changed, what "changes" to those provisions were deemed "necessary," and what the mechanism would be for implementing the changes.

By January 1996, reports Watson, Arafat — notwithstanding his letter to Rabin and Article XXXI(9) — "was taking the position that the Covenant did not need to be amended because the PNC had already made declarations in 1988 and 1991 recognizing Israel's right

245. WATSON, *supra* note 8, at 204.

246. See Article XXXI of the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (Sept. 28, 1995), *reprinted in* WATSON, *supra* note 8, at 366.

to exist and renouncing terrorism.”²⁴⁷ In other words, Arafat was saying that no “changes” were in fact “necessary.” In March 1996, however, the Palestinians released a new draft Palestinian Charter containing conciliatory language that at least arguably removed the offending passages.²⁴⁸

The PNC met, for the first time in five years, in April 1996. It did not, however, adopt the March 1996 draft language, or indeed any new Charter language. Instead, it passed a resolution, on April 25, 1996, in which the PNC decided:

- 1) The Palestinian National Charter is hereby amended by canceling the articles that are contrary to the letters exchanged by the P.L.O. and the Government of Israel 9-10 September 1993.
- 2) Assigns its legal committee with the task of redrafting the Palestinian National Charter in order to present it to the first session of the Palestinian central council.²⁴⁹

This resolution neither created a new Charter text nor specified which articles were cancelled. It also did not clearly describe the process by which a new Charter text would come into force. The ambiguity left many questions unresolved. For example, was the resolution understood to have given the legal committee a blank check to create a new Charter text that would come into force upon presentation to the first session of the Palestinian Central Council? Or would the PNC need to reconvene to approve the new Charter text? What would the Charter look like in the meantime? How would people know which articles had or had not been cancelled?

As it happened, the legal committee’s six-month deadline for completing a redrafted Charter “came and went.”²⁵⁰ Benjamin Netanyahu succeeded Shimon Peres as Prime Minister of Israel and his new government “sought a renewed, more definite Palestinian commitment to amend” the Charter.²⁵¹ Accordingly, the Note for the Record prepared in conjunction with the Hebron Protocol, which was signed on January 15, 1997, contained yet another phrasing of the Charter obligation.²⁵²

According to Watson, “this language still contained some ambiguity,”²⁵³ and by autumn 1998 there was still no new Charter. And so, at the Netanyahu government’s request, the following provision was

247. WATSON, *supra* note 8, at 204.

248. *See id.* at 204-05.

249. *Id.* at 205.

250. *Id.* at 206.

251. *Id.*

252. *See* Note for the Record (Jan. 15, 1997), *reprinted in* WATSON, *supra* note 8, at 376.

253. WATSON, *supra* note 8, at 208.

included at Article II.C.2. of the Wye River Memorandum, which was signed on October 23, 1998:

PLO Charter

The Executive Committee of the Palestine Liberation Organization and the Palestinian Central Council will reaffirm the letter of 22 January 1998 from PLO Chairman Yasir Arafat to President Clinton concerning the nullification of the Palestinian National Charter provisions that are inconsistent with the letters exchanged between the PLO and the Government of Israel on 9/10 September 1993. PLO Chairman Arafat, the Speaker of the Palestine National Council, and the Speaker of the Palestinian Council will invite the members of the PNC, as well as the members of the Central Council, the Council, and the Palestinian Heads of Ministries to a meeting to be addressed by President Clinton to reaffirm their support for the peace process and the aforementioned decisions of the Executive Committee and the Central Council.²⁵⁴

"On returning home [from Wye], Netanyahu cited the above provision as one of the main successes of Israeli diplomacy."²⁵⁵ But the wording of the provision is in fact "singularly nebulous."²⁵⁶ Kleiman notes that "[t]here is no explicit proviso for the PNC body as such to reconvene formally."²⁵⁷ Rather, members of the PNC were to be among the invitees to a meeting where those present would be asked to "reaffirm their support" for Executive Committee and Central Council decisions reaffirming the January 22, 1998, letter from Arafat to Clinton. There is provision neither for a majority vote of two-thirds of the members of the PNC nor for publication of an amended Charter text.

President Clinton participated in a meeting on December 14, 1998, in Gaza, "attended by about 500 of an estimated 650 members of the Palestine National Council," at which a vote was taken, by show of hands, "in support of Mr. Arafat's decision to amend the charter."²⁵⁸ The next day, Prime Minister Netanyahu pronounced himself satisfied.²⁵⁹ In reporting the event, the New York Times mentioned the April 1996 meeting at which the PNC had addressed the issue of the offending Charter clauses. The Times noted that in insisting on the insufficiency of the April 1996 proceedings, "the Israelis [had] pointed

254. The Wye River Memorandum (Oct. 23, 1998), *reprinted in* WATSON, *supra* note 8, at 380.

255. KLEIMAN, *supra* note 22, at 121.

256. *Id.*

257. *Id.*

258. Deborah Sontag, *Clinton Watches as Palestinians Drop Call for Israel's Destruction*, N.Y. TIMES, Dec. 15, 1998, at A1.

259. See Deborah Sontag, *Israel Won't Meet Friday Timetable for Next Pullout*, N.Y. TIMES, Dec. 16, 1998, A1.

to the continued inclusion of the clauses in copies of the charter.”²⁶⁰ Unfortunately, as of March 2003, the only copies of the Charter which were available (at least in English) on official PA websites still contained every single one of the offending clauses. After all the laboring over every jot and tittle of at least five different ambiguous expressions of commitment, the process has apparently still not been completed.

Indeed, on February 1, 2001, “one hundred Palestinian personalities, including members of the Palestinian Authority’s Executive Council and members of the PNC, met in Cairo under the chairmanship of the Speaker of the PNC.”²⁶¹ Among the resolutions they passed was one that maintained that the historical Palestinian Charter “was still in force, because the PNC had not been convened for the purpose of approving changes in the Covenant and, especially, since the legal committee that should prepare the changes had not been set up.”²⁶²

This game, played out for all the world to see, of writing and rewriting this same basic commitment, which has still not been completely carried out, has wasted precious peacemaking energy. Dragging out this simple matter has also fed cynicism about the Accords and cast a shadow over the Oslo process, causing Israelis to doubt the Palestinian commitment to peace and fostering Palestinian anxieties about Israeli micromanagement of their internal processes. Although the Charter squabble has been a particularly egregious example of destructive ambiguity, it is far from the only one. Ambiguous language has sent the Israelis and Palestinians round and round about Palestinian security commitments,²⁶³ the scope and pace of Israeli re-deployments,²⁶⁴ the permissibility of Israeli settlement building,²⁶⁵ and the meaning of Palestinian “safe passage” between the West Bank and Gaza Strip,²⁶⁶ among other issues. In the meantime, relatively little negotiating time was spent, and relatively little progress was made, on central, substantive permanent-status issues such as Jerusalem and refugees.

260. Sontag, *supra* note 258, at A1.

261. Yossi Ben-Aharon, *supra* note 144, at 60.

262. *Id.*

263. See, e.g., WATSON, *supra* note 8, at 211-36.

264. *Id.* at 105-31.

265. *Id.* at 132-36, 141-42.

266. See, e.g., *id.* at 148-57.

CONCLUSION

This Review's analysis of the Oslo Accords and their failures reveals important lessons about what in a bilateral peace agreement's text can maximize, and what can diminish, the likelihood that the parties will comply with the agreement's terms. Building on *Lessons of Failure, Oslo & International Law*, and *Breakthrough*, this analysis makes clear that the Oslo process and texts failed to take advantage of many of the most valuable contributions that international law can make to successful peace negotiations.

Some of these potential contributions were largely or entirely inapplicable to Oslo because of the particular characteristics of the parties, their histories, and their conflict. But many compliance-maximizing tools could have been more usefully employed in the Oslo process and Accords. The failure to take advantage of these tools meant the Accords were, from the beginning, weaker than they could have been. That congenital weakness was compounded by the parties' heavy reliance on two methodological pillars — "open-ended gradualism" and "constructive ambiguity" — that proved to be disastrously counterproductive.

Notwithstanding the understandable skepticism of some observers, this Review posits that international law and international agreements — properly deployed — can serve as useful tools for resolving conflicts even in many of the darkest recesses of the international jungle.

For example, international law offers numerous formal mechanisms for resolving disputes between the parties to an agreement. The Oslo Accords specified several such mechanisms as options to which the parties could turn in case of disagreement. Other provisions of the Accords *required* the parties to avail themselves of specific dispute-resolution mechanisms in certain circumstances. But in dispute after dispute, the PA/PLO and Israel ignored both the optional mechanisms and the required mechanisms.

International law supplies norms that can provide a useful starting point for, and place outer limits on, a peace negotiation and resulting agreement. In the case of the Israeli-Palestinian conflict, some relevant norms were too indeterminate to be of use, and some specific disputes were too freighted with emotion to be resolved through anything other than negotiation. But the Accords would have met with more success if Yasser Arafat, in particular, had adhered to the international legal norm of interpreting and performing obligations in good faith.

International law also offers several means of increasing the likelihood of compliance with agreements — both interim and permanent — by lending legitimacy to the process and the texts. Legitimacy, the factor which noncoercively encourages compliance with rules, is accorded in greater measure to agreements that are legally binding

than to those that are nonbinding. The Accords were legally binding, but not indisputably so. It is possible that the lack of clarity on this point may have undermined compliance.

Another compliance-maximizing factor is the phenomenon of parties choosing to obey a rule, despite the fact that violating it would bring certain short-term gains, because they expect that their long-term benefits from the future operation of the same norm will outweigh the short-term gains. This phenomenon was inevitably less applicable to the Oslo Accords because of the characteristics of the Israeli-Palestinian conflict. Unlike with many international agreements, the obligations which the two parties undertook in the Oslo Accords needed in many cases to be very different. But there seems to have been little or no conscious effort to maximize the similarity of those obligations that could be made similar.

The Oslo Accords also could have, but did not, specify the costs or consequences of violations. The lack of such provisions may have contributed to the Accords' failure to deter violations. The Oslo Accords also failed to foster the creation of vested material interests in compliance. Economic interests, which could have been given more attention in the Accords, were instead treated as an afterthought.

Even though almost all recent scholarship on compliance with international law has been focused on multilateral agreements (and particularly those which are nonbinding), some of the theories that have emerged from this literature can also be useful for promoting compliance with bilateral peace agreements. For example, some scholars have identified a belief in the long-term benefits of participation in the international community as a motivating force for compliance. The Oslo Accords might have derived greater benefit from this principle if the parties, which had been relatively isolated from — and thus were skeptical of — the international community, had been advised of specific international communal benefits they would receive following a resolution of their conflict.

Instead of finding ways to benefit from the aforementioned compliance-maximizing tools, the framers of the Oslo Accords relied heavily on "open-ended gradualism" and "constructive ambiguity" in crafting their agreements. The logic behind "open-ended gradualism" was to defer issues that were hard to resolve in the hope that gradually intensifying cooperation between the two sides, and progressively increasing the concessions of each to the other, would build sufficient trust to enable later compromises.

But the Accords' open-endedness as to final status arrangements enabled both sides' leaders to create dangerous expectations by promising their people unattainable results, fed each party's concerns about the other's good faith, deprived both sides' leaders of a vision of the future to sell to their people, left the process hostage to extremists,

and encouraged the parties to unilaterally improve their positions on the ground for the final negotiations.

Gradualism meant almost continual negotiations. These diverted policy analysis resources from permanent-status issues to incremental changes, and created business-sapping uncertainty. Public skepticism was increased by minor interim agreements that seemed to change nothing, friction between the two leaderships was fed by missed deadlines, and changing obligations meant the Accords were unable to benefit from the compliance-promoting efficiencies of routinization.

The Oslo framers' extensive reliance on "constructive ambiguity" to paper over differences also seemed to create more problems than it solved. For example, it induced false public expectations as to what had been resolved and fostered dangerous misconceptions as to what had been gained or conceded. Tensions caused by ambiguity in certain areas (such as Charter revision) wasted valuable negotiating energy and undermined the perceived legitimacy of the agreement as a whole.

It is impossible to say whether an improved Oslo process and texts would have brought peace. But it seems likely that agreements which made better use of the aforementioned compliance-maximizing tools would have had a stronger claim to legitimacy and therefore would have less quickly lost their ability to inspire compliance. International law's potential contributions to international agreements, including peace agreements, are just that, potential. They must be consciously harnessed. There has been very little discussion in either legal scholarship or the policy community of what in a bilateral peace agreement text can maximize, and what can diminish, the likelihood that the parties will comply with the agreement's terms. The Oslo Accords have thus far bought more process than peace. Many other intranational conflicts also remain unresolved, with a bloody trail of failed peace agreements left in their wake. If paper is going to serve as a worthy alternative to power in the international arena, much more attention must be given to the art of crafting a peace agreement so as to maximize the likelihood that the parties to it will comply with its terms.